

NOT FOR PUBLICATION

NO. 26129

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAI'I

Civ. No. 00-1-1277

JOHN M. DUBOIS, Plaintiff v.
ASSOCIATION OF APARTMENT OWNERS OF 2987 KALAKAUA,
and DOE ENTITIES 1-50, Defendants

and

Civ. No. 01-1-0709

JOHN M. DUBOIS, Plaintiff-Appellant, v.
ASSOCIATION OF APARTMENT OWNERS OF 2987 KALAKAUA,
Defendant-Appellee, and DOE ENTITIES 1-50, Defendants

and

Civ. No. 01-1-2386

JOHN M. DUBOIS, Plaintiff-Appellant, v.
ASSOCIATION OF APARTMENT OWNERS OF 2987 KALAKAUA,
Defendant-Appellee, and CERTIFIED MANAGEMENT, INC.,
a Hawaii Corporation, Defendant

and

Civ. No. 01-1-2637

ASSOCIATION OF APARTMENT OWNERS OF 2987 KALAKAUA,
Plaintiff-Appellee, and DOE ENTITIES 1-50, Plaintiffs,
v. JOHN M. DUBOIS, Defendant-Appellant

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT

SUMMARY DISPOSITION ORDER

(By: Burns, C.J., Lim and Fujise, JJ.)

Appellant John M. Dubois (Dubois) appeals from
judgments entered in four cases¹ brought in the Circuit Court of

¹ Although the parties filed various motions to consolidate and they, along with the court, have treated these cases as consolidated, no order consolidating these cases appears in the record.

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the First Circuit² (circuit court) pertaining to the repair, ownership and possession of Unit 102 of the condominium project located at 2987 Kalakaua Avenue (Unit 102): (1) Civil Number 00-1-1277, a tort action against Appellees Association of Apartment Owners of 2987 Kalakaua (Association) (tort action); (2) Civil Number 01-1-0709, a declaratory relief action against the Association and Certified Management, Inc. (Certified) (declaratory relief action); (3) Civil Number 01-1-2386, an action for declaratory and injunctive relief against the Association (injunction action) and (4) Civil Number 01-1-2637, an action for ejectment brought by the Association against Dubois (ejectment action).

After a conscientious review of the record and briefs submitted and carefully considering the issues raised and arguments advanced in light of the applicable law, we resolve these appeals as follows:

Civil Number 00-1-1277.

In the tort action, the parties entered into a "Stipulation for Partial Dismissal with Prejudice of All Claims and All Parties in Civil No. 00-1-1277-04" on September 5, 2003.

² The Honorable R. Mark Browning entered the "Order Denying Plaintiff John Dubois' Application to Enjoin Non Judicial Foreclosure Set for March 16, 2001" in Civil Number 01-1-0709 (declaratory relief action). The Honorable Gary W.B. Chang entered the judgments in the declaratory relief action, Civil No. 01-1-2386 (injunction action), and Civil No.01-1-2637 (ejectment action).

NOT FOR PUBLICATION

Although called a "partial dismissal," the stipulation provided "the complaint filed herein . . . and the affirmative defenses raised . . . be and are hereby dismissed." It appears that the "partial" nomenclature was to make clear that the parties intended to settle the tort action separately. On September 5, 2003, a "Notice of Entry of Judgment" was filed in the tort action, stating only, "[p]ursuant to the provisions of the Hawaii Rules of Civil Procedure, Rule 77(d), NOTICE IS HEREBY GIVEN of the entry of Judgment in favor of Association of Apartment Owners of 2987 Kalakaua against John M. Dubois in the above-entitled cause." No document entitled "judgment" appears in the record of the tort action.

On October 6, 2003, Dubois filed a notice of appeal³ "from the Final Judgment/Notice of Entry of Final Judgment of the Circuit Court of the First Circuit, State of Hawaii entered on September 5, 2003 and attached hereto as Exhibit 'A.'" However, "Appendix 'A'" consisted of the "Notice of Entry of Judgment" which was filed in this tort action on September 5, 2003 and an August 19, 2003 "Judgment," which was not. Moreover, this August 19, 2003 Judgment did not refer to the tort action but did specifically resolve the claims in the other three actions. In

³ We note that virtually identical documents were filed on the same date and time in the declaratory relief, injunctive relief and ejectment actions.

NOT FOR PUBLICATION

light of the state of the record, we must conclude that Dubois did not intend to appeal the dismissal of the tort action.

Civil Number 01-1-0709.

In the declaratory relief action filed on March 6, 2001, Dubois sought

1. A declaration that foreclosure cannot proceed;
2. Plaintiff be adjudged to be the absolute and unqualified owner, in fee simple, of the Unit 102 described in the complaint;
3. The court adjudge and decree the Defendant does not have any estate or interest whatsoever in the land and premises;
4. The purported Notice of Lien mentioned and described in the complaint as having been made by Defendant be declared fraudulent, null and void, and of no effect;
5. Defendant be forever enjoined and debarred from asserting any claim whatever in the Unit 102 and premises, adverse to Plaintiff;
6. Plaintiff recover judgment against Defendants in the an [sic] amount to be determined at trial;
7. Plaintiff be awarded the costs of this suit; and
8. Such other and further relief as the court deems proper and equitable.

On March 12, 2001, Dubois filed a motion to enjoin the auction "set for March 16, 2001" in the nonjudicial foreclosure that was pending against Unit 102. After an evidentiary hearing held on March 22, 2001 on this motion, the Association apparently agreed to submit the matter to mediation and to postpone the auction of Unit 102. The circuit court entered an order denying the motion to enjoin on July 17, 2001. In his order, Judge R. Mark Browning specifically ordered that the Association's

NOT FOR PUBLICATION

voluntary stay of its nonjudicial foreclosure action was lifted. However, Judge Browning did not enter a separate judgment based on this order.

On June 9, 2003, the Association filed a motion for ejectment. At the hearing held on July 9, 2003, Judge Gary W.B. Chang orally granted the Association's motion, noting,

Turning to the injunction regarding foreclosure; that is, case No. 01-1-0709, that matter appears to have been adjudicated previously by the Court, so the Court believes that that matter is already adjudicated.

On August 18, 2003, Dubois filed a motion for relief from the order granting the Association's motion for ejectment (Motion for Relief) pursuant to Hawai'i Rules of Civil Procedure (HRCP) Rule 7 and Rule 60(b)(1); (2); (6). Dubois argued that he should be allowed to present new evidence to the circuit court in support of his position that the Association's motion for ejectment should have been denied.

The following day, August 19, 2003, the circuit court entered its written order granting the Association's motion for ejectment, ruling, with respect to this declaratory relief action:

1. Civil No. 01-1-0709-03 - The Court finds that the Order Denying Plaintiff John Dubois' Application to Enjoin Non Judicial Foreclosure Set for March 16, 2001, filed in this case on July 17, 2001, fully adjudicated all claims in this action:

On the same day--August 19, 2003--a Judgment was entered, which read, in pertinent part,

NOT FOR PUBLICATION

2. Civil No. 01-1-0709-03.

Judgment is hereby entered in favor of the Association and against Dubois as to all claims in the Complaint, filed herein on July 17, 2001.

This Judgment became the final, separate judgment in this declaratory relief action as well. On September 19, 2003, the circuit court entered its order denying Dubois's Motion for Relief from the order of ejectment. On October 6, 2003, Dubois filed his notice of appeal.

Hawai'i Rules of Appellate Procedure (HRAP) Rule 4(a)(1) requires that the notice of appeal be filed within 30 days after the entry of judgment. An HRCR Rule 60 motion filed within 10 days after entry of the judgment is treated as a motion to alter the judgment and extends the time for appealing the judgment. Simpson v. Dep't. of Land & Natural Res., 8 Haw. App. 16, 21, 791 P.2d 1267, 1271 (1990). A motion to reconsider a judgment filed before judgment is entered is deemed filed "within 10 days after entry of judgment" and extends the time for appealing a judgment. Saranillio v. Silva, 78 Hawai'i 1, 7, 889 P.2d 685, 691 (1995). Thus, Dubois's motion could have tolled the time for filing his notice of appeal in this declaratory relief action.

However, a review of the record leads to the conclusion that Dubois's Motion for Relief, filed in all four cases, was merely a duplicative filing as to this declaratory relief action. Dubois's complaint in this declaratory relief action sought prospective relief--to prevent the foreclosure auction from

NOT FOR PUBLICATION

taking place--and the Motion for Relief and supporting documents sought to overturn the completed foreclosure and prevent the removal of the occupants of Unit 102. Therefore, we conclude that Dubois's Motion for Relief was not an effort to seek relief from the August 19, 2003 Judgment also filed in this declaratory relief action as it did not address the claims and issues raised in this declaratory relief action.

As Dubois's notice of appeal was filed more than 30 days after the judgment entered in this case, we lack jurisdiction over this appeal and will not address Dubois's second point on appeal challenging Judge Browning's denial of his application for injunction of the nonjudicial foreclosure, which is based solely on citation to the record in this declaratory relief action.

Civil Numbers 01-1-2386 and 01-1-2637.

In the injunction action, Dubois prayed for declaratory relief--claiming, *inter alia*, that the foreclosure sale provided insufficient notice and was in violation of a court ordered stay--and for injunctive relief, seeking to prohibit the Association from physically removing him from his apartment without the benefit of a court order. In the ejectment action, the Association requested a judgment in the sum of \$47,518.36, a writ of possession in favor of the Association, an order authorizing

NOT FOR PUBLICATION

the Association to dispose of any personal property found in Unit 102, and an award of fees and costs.

Again, in both of these actions, the parties sought a determination of the validity of the nonjudicial foreclosure and the appropriate remedy stemming therefrom. The Association filed a motion for ejectment "under HRCF Rule 56" in both cases⁴ on June 9, 2003 and Judge Chang entered a written order,⁵ granting

⁴ Actually, as explained by one of the Association's counsel at the hearing on the June 9, 2003 motion for ejectment, it was addressed to three actions, Civil Numbers 01-1-0709, 01-1-2368 and 01-1-2637 and, as noted above, was filed in all four cases.

⁵ The court's order provided, in pertinent part,

2. Civil No. 01-1-2386-08- The Court finds, viewing the evidence in the light most favorable to Dubois, that there is no genuine issue as to any material fact and grants summary judgment in favor of Movant Association and Defendant Certified and against Dubois for the relief prayed for in the Complaint, filed herein on August 14, 2001.

3. Civil No. 01-1-2637-09- The Court finds, viewing the evidence in the light most favorable to Dubois, that there is no genuine issue as to any material fact and grants summary judgment in favor of Movant Association and against Dubois as to Count I of the Complaint for Ejectment, filed herein on September 7, 2001. Movant Association, through its counsel, orally waived its claim for legal fees under Count II of its Complaint in this case, and the Court finds Movant Association's claims in this case are fully adjudicated by this Order.

Except as otherwise expressly stated herein: (i) all parties and all persons claiming any interest in the Apartment or any proceeds therefrom by, through or under Dubois, shall be forever barred and foreclosed of and from all right, title and interest, at law or in equity, in and to the Apartment and (ii) any and all other or further encumbrances or claims in respect of the Apartment, or any part of it, which arose from and after July 20, 2001, the date of the recording of the quitclaim deed transferring the Apartment to Movant Association, are hereby forever barred of and from any and all right, title and interest, at law or in equity, in and to the Apartment and every part of it or to any proceeds arising from any subsequent sale of the Apartment;

IT IS FURTHER ADJUDGED ORDERED and DECREED that Dubois and anyone holding through or under him shall vacate the

(continued...)

the Association's motion on August 19, 2003 and the final judgment based on that order on the same date. Dubois's motion for relief pursuant to HRCP Rule 60 tolled the time to file his notice of appeal until 30 days after the entry of a decision on that the motion, here, September 19, 2003. As Dubois's notices of appeal were filed in both cases on October 6, 2003, they were timely and we have jurisdiction over these two cases.

The Circuit Court Was Correct in Granting the Association's Motion for Ejectment.

Dubois first argues that the circuit court erred in granting the Association's motion for ejectment and in ruling that the Association did not violate Hawaii Revised Statutes (HRS) Chapter 515, Discrimination in Real Property Transactions.⁶

⁵(...continued)

Apartment by 12:01 a.m. on Monday, September 8, 2003; and that, if they fail to do so, Movant Association or its nominee shall be entitled to immediate, exclusive possession of the Apartment; and the Court hereby orders that a Writ of Possession be issued in favor of Movant Association, or its nominee, against Dubois and any other persons claiming by, through and under him, for possession of the Apartment described in Exhibit "A". Said Writ shall issue upon the failure of Dubois or anyone holding through or under him to vacate the Apartment by the above date and time, and Movant Association, or its nominee, shall be allowed to dispose of any personal property which remains in the Apartment after Movant Association obtains possession of the Apartment.

The Court expressly finds no just reason for delay, and judgment shall be entered, pursuant to Rules 54(b) and 58, H.R.C.P., as a final judgment as to all claims determined by this Order.

⁶ Judge Chang also stated that, as to the declaratory relief action, he would not rule as Judge Browning's order disposed of that case. Judge Chang ruled summary judgment was appropriate in the injunction action as the basis of Dubois's argument--that he was not given adequate notice of the auction before it was actually held--was meritless insofar as the statutes relied upon did not require the notice Dubois claimed. Dubois challenges neither ruling
(continued...)

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The Association's motion was based on HRCP Rules 7 and 56, and the argument "that there [were] no disputed facts and the Association [was] entitled to judgment as a matter of law." Judge Chang ruled that Dubois presented insufficient facts to establish "the dog or dogs in question are, quote, 'service animals' within the meaning of Chapter 515" and there were no genuine issues of material fact as the Association was "the current holder of title."

Although it is true that we review the grant of summary judgment de novo, Querubin v. Thronas, 107 Hawai'i 48, 56, 109 P.3d 689, 697 (2005), the record presented here supports Judge Chang's ruling. The Association had filed with the circuit court copies of the "Association's Affidavit of Foreclosure Sale Under Power of Sale" and the resulting quitclaim deed in its favor. The former, which attested to and documented full compliance with the statutory requirements of a nonjudicial foreclosure was competent evidence that the power of sale was duly executed, HRS 667-8, and thus supported the validity of the latter. As Dubois did not contest the matters averred, he established no genuine issues of material fact and thus the Association's motion was properly granted.

In his remaining point on appeal, Dubois claims error in the denial of his HRCP Rule 60 Motion for Relief based on newly discovered evidence. The disposition of a HRCP Rule 60(b)

⁶(...continued)
on appeal.

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motion is reviewed for abuse of discretion. Beneficial Hawaii, Inc. v. Casey, 98 Hawai'i 159, 164, 45 P.3d 359, 364 (2002).

Dubois argued that it would be "unfair" for Judge Chang not to consider "new evidence" that Dubois's roommate, Timothy Prindable (Prindable) needed his dog to assist him in ameliorating the effects of a medical condition and that the actions of the Association discriminated against him due to his disability.

This evidence took the form of (1) a declaration from a doctor who treated Prindable on September 15, 1997; (2) a "Final Written Report" and declaration signed by Prindable's "treating therapist" since October 17, 2002; (3) a declaration from a person who "housed and trained" the subject dog during the period between December 17, 1999 and January 25, 2000; (4) a declaration from Prindable's current treating physician, who diagnosed him with "major depression, recurrent type, and anxiety;" (5) a declaration from the subject dog's "treating veterinarian" since April 12, 2000; (6) a declaration from Dubois; and (7) a declaration from Prindable. Dubois's counsel confirmed that the reason these documents were not submitted earlier was "the doctors' not realizing the urgency of the situation." Based on the matters averred in these declarations, Judge Chang's finding that "I am unable to find in the record sufficient evidence to support the finding of due diligence," was not clearly erroneous and the resulting denial of Dubois's motion was not an abuse of discretion.

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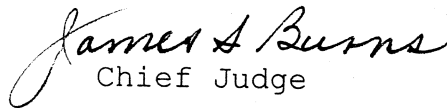
Therefore,

IT IS HEREBY ORDERED that Judge Chang's August 19, 2003 Judgment deciding all three cases (Civ. Nos. 01-1-0709, 01-1-2386 and 01-1-2637) is affirmed.

DATED: Honolulu, Hawai'i, April 27, 2006.

On the briefs:

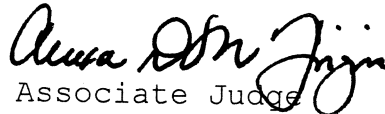
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Chief Judge

John A. Morris and
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(Civ. Nos. 01-1-0709 and
01-1-2637)


Associate Judge

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(Civ. No. 01-1-2386)


Associate Judge