

**Electronically Filed
Intermediate Court of Appeals
CAAP-10-000019
29-DEC-2010
09:27 AM**

NO. CAAP-10-000019

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

DOUGLAS H. DRAKE, Plaintiff/Appellee/Cross-Appellee,

v.

EARL K. GASPAR AND DIANA DANMEYER-GASPAR,
Defendants/Appellants/Cross-Appellees,

and

UNITED STATES OF AMERICA (DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE), MAKALEI ESTATES COMMUNITY ASSOCIATION,
DIANE ELLIS, Defendants/Appellees/Cross-Appellees,

and

FRANKLIN PAUL EMBERNANTE, LEILANI PAULINE EMBERNANTE,
Defendants/Appellees/Cross-Appellants

APPEAL FROM THE CIRCUIT COURT OF THE THIRD CIRCUIT
(CIVIL NO. 10-1-0067K)

ORDER GRANTING IN PART AND DENYING IN PART
OCTOBER 1, 2010 MOTION FOR DISMISSAL OF APPEAL
(By: Foley, Presiding Judge, Reifurth and Ginoza, JJ.)

Upon review of (1) Plaintiff/Appellee/Cross-Appellee
Douglas H. Drake's (Appellee Drake) October 1, 2010 motion to

dismiss appellate court case number CAAP-10-0000019, and (2) the record, it appears that we have jurisdiction over Defendants/Appellants/Cross-Appellees Earl Kamakahano Leslie Gaspar and Diana Roberta Danmeyer Gaspar's (the Gaspar Appellants) appeal from the October 20, 2010 judgment of foreclosure issued by the Circuit Court of the Third Circuit (Circuit Court)¹ pursuant to Hawaii Revised Statutes § 667-51(a)(1) (Supp. 2009), but we lack jurisdiction over Defendants/Appellees/Cross-Appellants Franklin Paul Embernate and Leilani Pauline Embernate's (the Embernate Cross-Appellants) cross-appeal from the October 20, 2010 judgment of foreclosure because the Embernate Cross-Appellants' cross-appeal is untimely under Rule 4.1(b)(1) of the Hawai'i Rules of Appellate Procedure (HRAP).

The October 20, 2010 judgment of foreclosure is an appealable judgment pursuant to HRS § 667-51(a)(1). "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 Gaspar Appellants filed their September 13, 2010 notice of appeal after the Circuit Court announced its decision, but before entry of the October 20, 2010 judgment of foreclosure. Nevertheless, "[i]f a notice of appeal is filed after announcement of a decision but before entry of the judgment or order, such notice shall be considered as filed immediately after the time the judgment or order becomes final for the purpose of appeal." HRAP Rule 4(a)(2). Accordingly, the Gaspar Defendants' appeal is timely under HRAP Rule 4(a)(2), and

¹ The Honorable Ronald Ibarra presiding.

we have jurisdiction over the Gaspar Appellants' appeal pursuant to HRS § 667-51(a)(1).

With respect to the timeliness of the Embernate Cross-Appellants' cross-appeal, however, "[t]he cross-appellant shall file with the clerk of the court appealed from a notice of cross-appeal and pay the filing fee within 14 days after the notice of appeal is served on the cross-appellant, or within the time prescribed for filing the notice of appeal, whichever is later." HRAP Rule 4.1(b)(1). In the instant case, the later of these two time periods is the thirty-day time prescribed for filing the notice of appeal under HRAP Rule 4(a)(1). The Embernate Cross-Appellants did not file their November 23, 2010 notice of cross-appeal within thirty days after entry of the October 20, 2010 judgment of foreclosure, as HRAP Rule 4.1(b)(1) requires. Therefore, the Embernate Cross-Appellants' cross-appeal is untimely under HRAP Rule 4.1(b)(1). 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 is authorized to change the jurisdictional requirements contained in Rule 4 of [the HRAP]."). Consequently, we lack jurisdiction over the Embernate Cross-Appellants' cross-appeal. Accordingly,

IT IS HEREBY ORDERED that we grant in part and deny in part the October 1, 2010 motion to dismiss appellate court case number CAAP-10-0000019 in that we dismiss the Embernate Cross-

Appellants' cross-appeal. The parties shall proceed with the briefing for the Gaspar Appellants' appeal according to HRAP Rule 28.

DATED: Honolulu, Hawai'i, December 29, 2010.


Daniel P. Foley
Presiding Judge


Lawrence M. Ripstein
Associate Judge


Jill M. King
Associate Judge