IN THE SUPREME COURT OF GUAM

BOB MERCHANT,
Plaintiff-Appellant,
vs.
NANYO REALTY, INC. and AQUA WORLD MARINA, INC.,
Defendant-Appellee.

Supreme Court Case No. CVA96-005
Superior Court Case No. CV1577-93
Filed: December 31, 1997
Cite as: 1997 Guam 16

Appeal from the Superior Court of Guam
Submitted without argument 18 August 1997
Agana, Guam

Decided 31 December 1997

OPINION

BEFORE: PETER C. SIGUENZA, Chief Justice, JANET HEALY WEEKS and JOAQUIN C. ARRIOLA, Associate Justices.

PER CURIAM:

[1] This matter is before the Court to determine whether the order dismissing the action below should be reversed due to various errors which the Plaintiff-Appellant claims occurred. However, because we determine that we will not exercise jurisdiction over the substance of this appeal, the Court does not reach these issues.

[2] We note that no judgment has been filed in the instant case. Guam Rules of Appellate Procedure (GRAP) Rule 4(a) permits a notice of appeal to be filed in advance of a judgment, but requires the judgment to be entered before the notice is given the effect of initiating an appeal.

In that circumstance, the notice "shall be treated as filed after such entry [of the judgment] and on the date thereof." More importantly, a final judgment is required by 7 GCA § 3108(a) as a prerequisite to this Court's exercise of jurisdiction.

[3] This is a point that appears to be missed by the Appellant in the jurisdictional statement set forth in his opening brief. There he asserts that this Court has jurisdiction because "the matter was disposed of by the Superior Court with finality when it issued a Decision and Order (presumably order dismissing the matter with prejudice) filed August 6, 1996". (Parenthetical phrase in original). In claiming that we have jurisdiction, the Appellant relies upon 7 GCA § 3107(b), which lists generally those matters over which this Court has jurisdictional authority. That subsection includes "final orders of the Superior Court" among those matters expressly reviewable. However, 7 GCA §§ 3108(a) and (b) additionally require, between them, either a final judgment or the satisfaction of criteria justifying interlocutory consideration. The Appellant addresses neither the issue of the judgment nor the possible qualification of this appeal for interlocutory review.

[4] The Appellee asserts that the statement of jurisdiction provided in the Appellant's opening brief is defective. Although the Appellee agrees that the stated basis for jurisdiction properly identifies this Court's subject matter jurisdiction in reviewing a final order entered below (i.e., that it satisfies 7 GCA § 3107(b)) , the Appellee goes on to assert that the Appellant has failed to address the date that the appeal was filed, or to otherwise establish that the appeal is timely. Though the Appellee does not expressly raise the issue of the judgment's absence, it is clear that the Appellee is questioning this Court's exercise of jurisdiction. Moreover, the Appellee does challenge the timeliness of the appeal, an issue which brings into question the existence of the judgment which would have opened the interval for its filing.

[5] Given the absence of any judgment we cannot and will not exercise jurisdiction in this matter.

[6] We begin with the viewpoint that, absent exceptional circumstances permitting interlocutory review, the Guam legislature intended that 7 GCA § 3108 be strictly enforced. It states: "Appellate review to the Supreme Court of Guam shall be available only upon the rendition of final judgment in the Superior Court from which . . . appeal is taken." In the present matter, the

formalization of the judgment is addressed by Rule 58 of Guam's Rules of Civil Procedure for the Superior Court of Guam which states: "Subject to the provisions of Rule 54(b): (1) upon a general verdict of a jury, or upon a decision by the court that a party shall recover only a sum certain or costs or that all relief shall be denied, the clerk, unless the court otherwise orders, shall forthwith prepare, sign and enter the judgment without awaiting any direction by the court . . . ." Here, there was a dismissal of the action, a denial of all relief.

[7] There is no formal judgment complying with Rule 58's dictates. Moreover, there is no indication that any action which might be deemed an entry of the judgment has occurred. 7 GCA § 3108(a) has not been satisfied. Our jurisdiction does not obtain.

[8] In reaching this conclusion we are aware that the United States Supreme Court has interpreted federal provisions requiring entry of a final judgment, which are similar to our own rules[1], as permitting appellate courts to exercise jurisdiction, where jurisdiction is not contested, despite the lack of a separate document denominated a judgment as required by Federal Rule of Civil Procedure 58. *See Bankers Trust Company v. Mallis*, 435 U.S. 381 (1978) (per curiam). In that matter, the parties had proceeded on appeal to the Second Circuit Court of Appeals on "the assumption that there was an adjudication of dismissal" in the district court. 435 U.S. at 382. The court of appeals had accepted jurisdiction despite the omission of a judgment set forth as a separate document, and the Supreme Court approved the circuit's exercise of appellate review.

[9] The High Court's rationale appears to be that where there is: (1) the actual entry of a functional judgment (there through a notation on the clerk's docket indicating a judgment of dismissal) and (2) a waiver by the parties of the "separate document" requirement of Rule 58; there is nothing to be gained in the rule's formalistic application. 435 U.S. at 386-87. Where those two elements are established, courts may validly exercise jurisdiction despite the absence of a formal, separate judgment.

[10] However, we conclude for several reasons that *Mallis* should not direct the resolution of the jurisdictional issue

[1] *Compare* Guam's Rules of Civil Procedure for the Superior Court of Guam Rule 58, *supra*, *with* Fed. R. Civ. P. 58. Their language is identical in the portions bearing on this issue.

before us. Granted, both parties appear to have assumed that the Decision and Order entered 6 August 1996 was final as such. This appears to place them in much the same posture as those in *Mallis*[2]. However, here the Appellee, while failing to mount a specific objection to the lack of a separate judgment, has questioned this Court's jurisdiction. That challenge is based upon the Appellant's failure to establish that the appeal was filed within the prescribed period following the judgment's entry, and raises, albeit indirectly, an issue as to the event of the final judgment's entry.

[11] A more significant point of distinction relates to the evidence, or lack thereof, that the Superior Court intended the order in question to serve as a final judgment. In *Mallis*, the trial court clerk had made a docket notation reflecting that a judgment of dismissal had been entered[3]. Under Fed. R. Civ. P. 58 it is the clerk who is to enter the judgment where the action is dismissed outright, so the necessary action was unequivocally taken by the proper authority, if not in the proper form. In the present case, there is no docket entry that unequivocally indicates a final judgment. Rather, the docket entry documenting the order under appeal reads in relevant part: "MOTION TO DISMISS IS GRANTED". The docket entry does not in itself reflect that the dismissal affects the entirety of the action, nor does it reiterate the phrase "So ORDERED", which might be read, in a docket entry (as may have been the case in *Mallis*), as the Clerk's execution of the Judgment. The ambiguity inherent in the present disposition is openly acknowledged in the Appellant's own assertion of jurisdiction when he states that the order "presumably" dismissed the matter with prejudice. It is less than certain that the trial court intended that the decision be reduced to a judgment.

[12] While it may appear likely that the 6 August 1996 order was intended to finally dispose of the matter below, we will not assume such to obtain appellate jurisdiction here. The Guam Legislature has seen fit to limit our appellate

[2]The Court in *Mallis* noted that where the parties act on such an assumption, and fail to object to the absence of a separate judgment, the parties should be deemed to have waived the issue. 435 U.S. 388.

[3]It is unclear from the *Mallis* decision what the complete language was of the docket entry. That opinion notes, however, that it included the following: "Complaint dismissed in its entirety. So ORDERED." 435 U.S. 382 n.1.

jurisdiction, generally[4], to final determinations below. Absent a record that clearly establishes such finality we would be hard pressed to justify our exercise of appellate authority.

[13] Even if our forbearance was not compelled absolutely, we would be disinclined to reach out to this matter under the present circumstances. As noted above, the Appellant's own statement of jurisdiction flagged the fact that there was some uncertainty as to whether the order appealed from finally disposed of the action. He should have sought clarification below. A judgment meeting the terms of Rule 58 could have resolved such ambiguity. And although the Appellee failed to raise the "separate judgment" concern noted in *Mallis*, the issue here is actually whether there is a judgment at all, and the Appellee has taken issue with this Court's jurisdiction. Moreover, the Appellant's marginal compliance with substantive requirements of the Guam Rules of Appellate Procedure does not encourage us to reach this matter in its present posture[5].

[14] A fundamental purpose of Rule 58 is the unambiguous demarcation of a judgment's finality. *See United States v. Indrelunas*, 411 U.S. 216 (1973)(per curiam). The Rule should, and must be, mechanically applied in this and other cases to ensure that a determination addressed on appeal really is the trial court's final resolution, and to protect the litigants from uncertainty as to when a notice of appeal must be filed to be within the time permitted. See 6A J. Moore, Moore's Federal Practice 58.04[4.-2] (1972).

[15] In the short time this Court has been in existence we have seen a disproportionate number of cases which have contained jurisdictional issues stemming from lack of finality of the judgment. We have also seen other cases where the process of appeal was

[4]7 GCA § 3108(b) permits this Court to exercise jurisdiction over interlocutory matters under the limited circumstances set forth in that section. These provisions do not appear to reach the present matter, and none of the parties have suggested that this case is appropriate for interlocutory review.

[5]Rule 13(b)(5) requires that the parties include an argument as to each contention raised on appeal and that each argument be supported by legal authority. In addressing the six (6) issues he raises across his eight (8) page brief, the Appellant fails to cite any legal authority for several of those issues. He also failed to file the Excerpts of Record required by Rule 15.

inordinately delayed by the filing of judgments months, sometimes years, after the apparent determination of the matter below. Because we find that *Mallis* is not applicable given the different circumstances it presents, it is not necessary for us to determine whether we would, for purposes of Guam's judicial administration, accept jurisdiction over a matter like *Mallis*, where the separate document rule was not formally satisfied. It is our view that the separate document rule should be expressly honored.

[16] By dismissing this matter now based on our lack of jurisdiction, the Superior Court can properly address the issue of the dismissal's finality as a judgment. Once that issue is unequivocally resolved in the affirmative, an appeal may be taken that properly invokes our jurisdiction. We note that the parties may, as a consequence of having already briefed[6] the issues, be in a position to move the Court for expedited review if this appeal ultimately ripens.

[17] For the foregoing reasons, this appeal is DISMISSED without prejudice to its being refiled when it is appropriate for the exercise of our jurisdiction.

JANET HEALY WEEKS
Associate Justice

JOAQUIN C. ARRIOLA
Associate Justice

PETER C. SIGUENZA
Chief Justice

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[6]We would hope, however, that the Appellant would file an Excerpts of Record (per GRAP Rule 15) as well as comply with the substance of all other procedural requirements in the next incarnation of this appeal.