

IN THE SUPREME COURT OF GUAM

SKY ENTERPRISE

Plaintiff-Appellant,

vs.

KENZO Y. KOBAYASHI

Defendant-Appellee.

Supreme Court Case No.: CVA02-008

Superior Court Case No.: CV1390-00

OPINION

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Appeal from the Superior Court of Guam
Argued and submitted on October 4, 2002
Hagåtña, Guam

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BEFORE: PETER C. SIGUENZA, JR. Chief Justice; F. PHILIP CARBULLIDO, Associate Justice; and FRANCES TYDINGCO-GATEWOOD, Associate Justice.

TYDINGCO-GATEWOOD, J.:

[1] This court *sua sponte* raised jurisdictional issues regarding an appeal by Plaintiff-Appellant Sky Enterprise (“Sky”) from a Superior Court order granting Defendant-Appellee Kenzo Y. Kobayashi’s (“Kobayashi”) motion to compel inspection of Sky’s corporate books and Kobayashi’s cross-appeal from the same order. This opinion addresses only the jurisdictional issues involved in the appeal and cross-appeal. After giving the parties the opportunity to brief the issues and hearing oral arguments, we agree to hear the appeal but dismiss the cross-appeal for lack of jurisdiction. We issue this opinion to clarify that the time limits in the Guam Rules of Appellate Procedure apply to interlocutory appeals and cross appeals and that a cross appeal from an interlocutory order must independently meet the statutory requirements for an interlocutory appeal.

I.

[2] On August 18, 2000, Sky filed a complaint against Kobayashi, alleging claims of conversion, embezzlement, fraud, and breach of fiduciary duty. Kobayashi counterclaimed, alleging that Sky failed to pay Kobayashi his share of corporate dividends beginning in May 2000 and that Sky refused to allow Kobayashi to inspect its books and records.

[3] On December 28, 2000, Kobayashi filed a Motion to Compel Plaintiff to Permit Inspection of Corporate Books and Records. The trial court issued an order granting Kobayashi’s motion to inspect the records but denying his request that he be allowed to copy the records. Importantly for this opinion, the trial court’s order was entered on the Superior Court’s docket on March 19, 2002, but the Notice of Entry was not filed until March 22, 2002. Sky filed a notice of appeal on April 19, 2002 appealing the discovery order. On May 16, 2002, this court issued an order granting Sky’s request for an interlocutory review. Kobayashi then filed a notice of cross appeal on May 23, 2002.

[4] On September 27, 2002, this court issued an order to show cause why the appeal and cross-appeal should not be dismissed for failure to comply with the time limits for filing an appeal. Sky submitted a response arguing that its appeal was timely filed and that the time limits under the Guam Rules of Appellate Procedure should not apply to an interlocutory appeal. Kobayashi filed a non-opposition to Sky's response. A hearing on the order to show cause was held on October 4, 2002.

II.

[5] This court has jurisdiction over interlocutory appeals pursuant to Title 7 GCA § 3108(b) (1994). Jurisdictional issues may be raised by any party at any time or *sua sponte* by the court. *Pac. Rock Corp. v. Dep't of Educ.*, 2001 Guam 21, ¶ 18. We issue this opinion to clarify the application of the Guam Rules of Appellate Procedure to interlocutory appeals.

III.

[6] The first issue we decide here is whether an interlocutory appeal must meet the jurisdictional time limits of Rule 4(a) of the Guam Rules of Appellate Procedure, and if so, whether the time to file an appeal is measured from the filing of the entry of the judgment on the Superior Court docket or the filing of the notice of entry. The second issue we consider is whether a cross-appeal from an interlocutory appeal must also meet the jurisdictional time limits of Rule 4(a).

A. The Interlocutory Appeal

[7] The trial court order that Sky appeals from was entered on the Superior Court's docket on March 19, 2002. The Notice of Entry was not filed until March 21, 2002. Sky filed its Notice of Appeal on April 19, 2002, which is twenty-eight days from the date that the Notice of Entry was filed but thirty-one days after the entry of the order on the docket.

1. GRAP 4(a)

[8] Rule 4(a) of the Guam Rules of Appellate Procedure provides that “[w]hen an appeal is permitted by law from the Superior Court to the Supreme Court, the time within which an appeal may be taken in a civil case shall be thirty (30) days from the date of entry of judgment.” Guam R. App. P. 4(a). For an appeal taken as of right, this time limit for filing a notice of appeal “is an absolute requirement from which this court has no discretion to digress. . . . [A] timely notice of appeal is ‘mandatory and jurisdictional.’” *Gill v. Siegel*, 2000 Guam 10, ¶ 5 (quoting *United States v. Robinson*, 361 U.S. 220, 224, 80 S.Ct. 282, 285 (1960)).

[9] Both Sky and Kobayashi argue that the Rule 4(a) time limit should apply only to appeals taken as of right and not to discretionary appeals. The parties argue that jurisdiction over interlocutory appeals is governed solely by Title 7 GCA § 3108(b). Section 3108(b) allows this court to hear an appeal from an interlocutory order if resolving the questions of law on which the order is based would “(1) Materially advance the termination of the litigation or clarify further proceedings therein; (2) Protect a party from substantial and irreparable injury; or (3) Clarify issues of general importance in the administration of justice.” 7 GCA § 3108(b). The parties argue that under section 3108(b), this court can choose whether or not to hear an interlocutory appeal based solely on whether, in this court’s discretion, the appeal meets at least one of the three conditions, regardless of whether the appeal is timely. We disagree.

[10] First, we note that Guam has no statutorily set time limit for filing an interlocutory appeal. However, we have previously applied the Rule 4(a) time limit to interlocutory appeals. *See Gutierrez v. Charfauros*, CVA99-045 (Sup. Ct. Guam Oct. 29, 1999) (order dismissing interlocutory appeal for, among other things, failure to file a timely notice of appeal). In *Charfauros*, this court held that “if the Defendant-Appellant were seeking interlocutory review based upon the . . . order, a notice of appeal should have been filing [sic] within thirty (30) days from the docketing date.” *Id.* at n.1. This court has also made reference to the timeliness of a notice of appeal filed in other interlocutory appeals. *See People v. Pak*, 1998 Guam

27, ¶ 3 (“The trial court granted Defendant's motion by Order dated 20 March 1998. This [interlocutory] appeal was *timely* filed on 20 April 1998.”) (emphasis added); *People v. San Nicolas*, 1999 Guam 19, ¶ 4 (“The trial court heard argument and later issued a written decision and order on March 25, 1998.... No final judgment followed. The People filed a *timely* Notice of Appeal on March 27, 1998 and San Nicolas, in turn, filed a timely Notice of Cross-Appeal on April 7, 1998.”) (emphasis added).

[11] Our application of Rule 4(a)'s time limits to interlocutory appeals is supported by the Guam Rules of Appellate Procedure and the policy underlying Rule 4(a). As indicated by the language of Rule 4(a), the time limits set forth therein are not necessarily limited to final judgments. Rule 4(a) sets the time limit for filing a notice of appeal at “thirty (30) days from the date of entry of *judgment*.” GRAP 4(a) (emphasis added). However, Rule 4(a) also provides that a “judgment *or order* is entered within the meaning of this subdivision when it is entered in the civil or criminal docket and notice is given to the parties....” GRAP 4(a) (emphasis added). Moreover, the applicability of Rule 4(a) to discretionary appeals is indicated by rule 11(b), which provides that for good cause, this court “may upon motion enlarge the time prescribed by these rules or by its order ... but the court may not enlarge the time for filing a notice of appeal ... or a petition for permission to appeal.” Guam R. App. P. 11(b).

[12] Additionally, the policy behind the Rule 4(a) time limit in the context of final judgments similarly supports application of the time limit to an appeal from an interlocutory order. The purpose of setting the time limit for an appeal is “to set a definite point of time when litigation shall be at an end, unless within that time the prescribed application has been made; and if it has not, to advise prospective appellees that they are freed of the appellant's demands.” *Gill*, 2000 Guam 10 at ¶ 5 (quoting *Browder v. Dir., Dep't of Corr. of Illinois*, 434 U.S. 257, 264, 98 S. Ct. 556, 561 (1978)). This reasoning also supports limiting the time within which an interlocutory appeal may be filed, where the parties must be equally assured that they can rely on the trial court's order once the time to file an appeal has passed. Accordingly, we hold that a notice of appeal from an interlocutory order must be filed within the Rule 4(a) time limits.

[13] We further reject the parties' argument that because this court issued an order that stated that it would exercise its discretion to grant immediate review of the trial court's March 19 order, this court cannot now choose to dismiss the appeal. Jurisdictional issues may not be waived and may be raised at any time by either party or by the court *sua sponte*. See *Pac. Rock Corp.*, 2001 Guam 21 at ¶ 18. Because the time limit for filing an appeal is jurisdictional, it must be complied with, notwithstanding any order from this court agreeing to hear a discretionary appeal.

2. Entry of judgment

[14] We now turn to the issue of when the thirty-day time period to file an appeal begins to run. Rule 4(a) provides that "the time within which an appeal may be taken in a civil case shall be thirty (30) days from the date of entry of judgment." GRAP 4(a). A judgment or order is entered within the meaning of Rule 4(a) when it is entered on the docket "and notice is given to the parties of this entry by the Clerk of the Superior Court." *Id.* This court has previously held that "[a]bsent Notice of the entry of Judgment the entry is without effect." *Archbishop of Guam v. G.F.G. Corp.*, CVA96-016 (Sup. Ct. Guam, Jan 22, 1997). In *Gill v. Siegel*, 2000 Guam 10, however, this court held that "[t]he time limit for filing an appeal commenced on the date Final Judgment was entered on the docket. . . ." *Gill*, 2000 Guam 10 at ¶ 13. The holding in *Gill* has created some confusion over which is the critical date that begins the time within which to file a notice of appeal.

[15] The issue in *Gill* was whether the language of Rule 4(a) requiring both entry and notice should be interpreted to require *receipt* of the notice of entry before the time limit for filing an appeal begins to run. This court rejected that argument. *Id.* at ¶¶ 8-10. In reaching its conclusion, this court discussed Rule 77(d) of the Guam Rules of Civil Procedure, which governs notice of entry of judgment. *Id.* Rule 77(d) provides in part that "[l]ack of notice of entry by the clerk 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)...”¹ Guam R. Civ. P. 77(d). Relying on federal authority interpreting the nearly identical rule 77(d) of the Federal Rules of Civil Procedure, this court found that “lack of notification by the clerk of entry of judgment has no effect whatsoever on the start of the allowable time for filing an appeal. With respect to an appeal, all that matters under this rule is that the judgment be entered.” *Gill*, 2000 Guam 10 at ¶ 9.

[16] Under both *Gill* and Rule 4(a), entry of judgment begins the time within which a notice of appeal must be filed. As discussed above, Rule 4(a) further provides that “[a] judgment or ordered is entered within the meaning of this subdivision *when it is entered in the civil or criminal docket and notice is given to the parties of this entry by the Clerk of the Superior Court.*” GRAP 4(a) (emphasis added). Additionally, GRCP 77(d) provides that the “[l]ack of notice of entry does not affect the time to appeal . . . *except as permitted by Rule 4(a).*” GRCP 77(d) (emphasis added). Rule 4(a) requires both entry and notice of entry to start the time for an appeal. Thus, an appeal must be taken within thirty days of the entry of the judgment, defined in Rule 4(a) as the date that both events have occurred.² To the extent that the dicta in *Gill* suggests otherwise, it is now clarified.

[17] We further find that the filing of the notice of entry effectively gives notice to the parties of the entry of the judgment on the docket and is sufficient to begin the thirty-day limit for filing a notice of appeal. Thus, we find that Sky’s interlocutory appeal is timely under Rule 4(a), and because we previously found that the interlocutory appeal meets the requirements of 7 GCA § 3108(b), it is properly before this court.

B. Cross Appeal from the Interlocutory Appeal

[18] We must next determine whether this court may exercise jurisdiction over Kobayashi’s cross appeal. Kobayashi filed a notice of cross appeal on May 23, 2002, more than two months from March 22,

¹ Although GRCP 77(d) refers to Rule 4(a) of the Federal Rules of Appellate Procedure and the Appellate Rules of the District Court of Guam, these rules have been supplanted by GRAP 4(a) for the purposes of GRCP 77(d). *Gill*, 2000 Guam 10 at ¶ 8, n. 3.

² This interpretation is also the most fair to prospective appellants, as under the procedure followed in the Superior Court for entering a judgment, a party has no way of knowing that the judgment has been entered until the notice of entry is filed.

2002, the date that the notice of appeal was filed, but within fourteen days of May 16, 2002, the date that this court issued an order granting the interlocutory appeal. Kobayashi argues that the time to file a cross appeal from an interlocutory order should start running from the date that this court issues an order granting immediate review, rather than from the date that the notice of appeal is filed.

1. GRAP 4(a)

[19] The Guam Rules of Appellate Procedure do not support Kobayashi’s position. As discussed above, the time limits set forth in Rule 4(a) apply to appeals of interlocutory orders. Rule 4(a) explicitly provides that “[s]ubsequent to a timely notice of appeal, any other party may file a cross-notice of appeal within fourteen (14) days *from the filing date of the first notice.*” GRAP 4(a) (emphasis added). There is nothing in the rule which directs that a notice of cross appeal be filed only after the court accepts an interlocutory appeal. Furthermore, this court does not always issue orders explicitly accepting interlocutory review. *See Fajardo v. Liberty House Guam*, 2000 Guam 4, ¶ 4 (accepting jurisdiction pursuant to 7 GCA § 3108(b) without objection or comment and without issuing an order agreeing to hear the appeal prior to the issuance of the opinion.). Thus, measuring the time for filing a notice of cross appeal from the date that this court issues an order agreeing to hear an interlocutory appeal rather than from the date that the notice of appeal is filed is not workable. Accordingly, because Kobayashi filed his notice of cross appeal more than fourteen days after Sky filed its notice of appeal, Kobayashi’s appeal was not timely filed.

[20] The next issue is whether Kobayashi’s failure to timely file a notice of cross appeal is a jurisdictional defect. We find that it is. Some jurisdictions have held that the timely filing of a notice of cross appeal is merely a procedural requirement and may be waived. *See Mendocino Env’tl. Ctr. v. Mendocino County*, 192 F.3d 1283, 1298 (9th Cir. 1999) (“Although an initial notice of appeal is mandatory and jurisdictional, a protective or cross-appeal is only the ‘proper procedure,’ not a jurisdictional prerequisite once an initial appeal has been filed.”) (quoting *Bryant v. Technical Research Co.*, 654 F.2d 1337, 1341 (9th Cir. 1981)). However, we agree with the opposing view that “[b]ecause a cross-appeal is a separate attempt

by an appellee to enlarge his own rights or lessen the rights of his adversary ... the time requirements for filing a cross-appeal pursuant to App.R. 4(A) are mandatory and jurisdictional.” *Kaplysh v. Takieddine*, 519 N.E.2d 382, 386-87 (Ohio 1988) (interpreting rules nearly identical to the Guam Rules of Appellate Procedure); *McCracken v. Edward D. Jones & Co.*, 445 N.W.2d 375, 383 (Iowa Ct. App. 1989); *see also Johnson v. Teamsters Local 559*, 102 F.3d 21, 28-29 (1st Cir. 1996); *Haas v. Freeman*, 693 P.2d 1199, 1204 (Kan. 1985) (interpreting the rule that the court lacks jurisdiction over untimely cross appeals to include interlocutory cross appeals); *Rolen v. Rhine*, 172 Cal. Rptr. 456, 457 (Cal. Ct. App. 1981) (dismissing both the appeal and cross appeal for lack of jurisdiction because neither was timely filed); 4 C.J.S. *Appeal and Error* § 270 (2002) (“Cross appeals ... must, in order to be available for consideration by the appellate court, be taken and perfected within the time prescribed by statute or rule of court. This requirement of timeliness is jurisdictional.”) (footnote omitted). Thus, because Kobayashi did not file his notice of cross appeal within the prescribed time, we lack jurisdiction over the cross appeal.

2. 7 GCA § 3108(b)

[21] In addition to the jurisdictional time requirements for cross appeals, a cross appeal from an interlocutory order must also meet the requirements of section 3108(b). An immediate appeal from an interlocutory order is available

as provided by law and in other cases only at the discretion of the Supreme Court where it determines that resolution of the questions of law on which the order is based will: (1) Materially advance the termination of the litigation or clarify further proceedings therein; (2) Protect a party from substantial and irreparable injury; or (3) Clarify issues of general importance in the administration of justice.

Title 7 GCA § 3108(b). The limitations on interlocutory appeals ensure that such appeals are granted only when “the necessity of immediate review outweighs [the] general policy against piecemeal disposal of litigation.” *Fedders v. Am. Family Mut. Ins. Co.*, 601 N.W.2d 861, 864 (Wis. Ct. App. 1999) (quoting *Cascade Mountain, Inc. v. Capitol Indem. Corp.*, 569 N.W.2d 45, 46 n.2 (Wis. Ct. App. 1997)). The considerations that compel a court to accept an initial interlocutory appeal do not necessarily apply to a

cross appeal. Accordingly, if any appeal, including a cross appeal, from an interlocutory order does not meet the section 3108(b) criteria, we lack jurisdiction to hear the appeal. *See San Nicolas*, 1999 Guam 19 at ¶ 11 (“San Nicolas has set forth no arguments to persuade this court to consider this matter as an interlocutory appeal. . . . Therefore, the court declines jurisdiction over San Nicolas' cross-appeal.”); *Fedders* at 864 (“The exercise of our discretion to grant leave to appeal would be severely hampered by the cross-appellant’ notion that once leave to appeal is granted, any party to the litigation could raise by cross-appeal any issue.”); *Trecartin v. Mahony-Troast Constr. Co.*, 120 A.2d 733, 734-36 (N.J. 1956).

[22] Because we find that Kobayashi’s cross appeal is not timely, we do not need to reach an analysis of the cross appeal under section 3108(b).

IV.

[23] An appeal from an interlocutory order, and a cross appeal from such an appeal, must meet the jurisdictional requirements of both GRAP 4(a) and 7 GCA § 3108(b). Because Sky filed its interlocutory appeal within thirty days from the filing of the notice of entry on the Superior Court docket, and because Sky’s appeal meets the requirements of section 3108(b), we have jurisdiction to hear the appeal. Because Kobayashi’s cross appeal is not timely under Rule 4(a), we have no jurisdiction over it. Therefore, we need not determine whether the cross appeal meets the section 3108(b) requirements, and it is hereby **DISMISSED**.