

NO. CAAP-12-0000999

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

TRUSTEES UNDER THE WILL AND OF THE
ESTATE OF BERNICE PAUAHI BISHOP, DECEASED,
also known as KAMEHAMEHA SCHOOLS,
Plaintiffs/Counterclaim-Defendants/Appellees,
v.

JEFFREY VEGAS and KERENAKUPU ESERA-VEGAS,
Defendants/Counterclaim-Plaintiffs/Appellees,
and

NICK WOOLFENDEN as Special Administrator of the Estate of
BRIAN K. WOOLFENDEN, also known as Brian Kenneth Woolfenden;
MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.,
solely as a nominee for Fremont Investment & Loan;
U.S. BANK NATIONAL ASSOCIATION, as Trustee,
on behalf of The Holders of the Home Equity Asset
Trust 2005-2 Home Equity Pass-Through Certificates,
Series 2005-2; GE CAPITAL HAWAII, INC.; FIRST RESOLUTION
INVESTMENT CORPORATION, GENERAL ELECTRIC CAPITAL CORPORATION,
Defendants/Appellees

and

JOHN DOES 1-10, JANE DOES 1-10, DOE PARTNERSHIP 1-10,
DOE CORPORATIONS 1-10, DOE ENTITIES 1-10,
and DOE GOVERNMENTAL UNITS 1-10, Defendants

and

FRANCIS KEOUA GORA,
Real Party-in-Interest/Appellant

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CIVIL NO. 09-1-1074)

MEMORANDUM OPINION

(By: Foley, Presiding J., Fujise and Reifurth, JJ.)

Real Party in Interest-Appellant Francis Keoua Gora
(Gora) appeals from the "Order Denying Francis Gora's Notice of

Appeal to the Circuit Court; Statement of the Case; Exhibit F; Designation of Record on Appeal; Order for Certification; Transmission of Record; Motion to Intervene, Hawaii Rules of Civil Procedure [(HRCF)], Rule 24; Motion for Clerical Mistakes, Hawaii Rules of Civil Procedure[] Rule 60." This post-judgment order was entered October 31, 2012 in the Circuit Court of the First Circuit¹ (circuit court).

I. BACKGROUND

Plaintiffs/Counterclaim-Defendants/Appellees Trustees Under the Will and of the Estate of Bernice Pauahi Bishop, Deceased, also known as Kamehameha Schools (Kamehameha Schools) sought to cancel the lease of 0.54 acres in Punalu'u (Punalu'u Beach Lots; Tax Map Key (TMK) No. (1) 5-3-001-029) and establish its rights to possession in that property. The lease was acquired by Jeffrey Vegas and Kerenakupu Esera-Vegas (the Vegases) in April 2007. Kamehameha Schools moved for summary judgment alleging the Vegases had failed to pay lease rent, taxes, and other fees and charges in the amount of \$163,116.24. The Vegases opposed Kamehameha Schools' motion for summary judgment, claiming they should not be liable for rent payments because Lessor-Kamehameha Schools had not yet consented to the assignment of the lease, and had failed to repair seawalls or perform other flood mitigation work on the property.

On June 20, 2012, the circuit court entered a Writ of Possession and Judgment for Possession for Kamehameha Schools. The Vegases did not appeal from the circuit court judgment but filed a counterclaim against Kamehameha Schools, alleging landowner liability for flooding.

On August 30, 2012, Gora's cousin Amelia Gora (Amelia), filed a post-judgment "Motion to Amend Eviction Decision/Writ of Possession Decision By Judge Sakamoto Due to Non-Title of Plaintiff in the Ahupuaa of Punaluu, Oahu; Affecting TMK (1) 5-3-001-029," which claimed that she and Gora, held an interest in

¹ The Honorable Karl K. Sakamoto presided.

the property. Amelia asserted "that the Vegas Family were given authorization to help take care of our family(ies) interests through a Protective Order on July 31, 2012, and an Amended Protective Order prior to their wrongful eviction." On September 13, 2012, Gora also submitted a "Motion For Objection To Eviction/Writ Of Possession Decision By Judge Sakamoto Due To, Contested Matter, Hawaii Probate Rules, Rule 19" that raised similar claims.

On October 16, 2012, the circuit court issued orders denying Amelia and Gora's motions. The circuit court "determine[d] that [Gora was] not a party to the present case and . . . failed to intervene despite his contention that he along with Amelia Gora are the rightful owners of the Subject Property." The circuit court added, "any attempt to intervene by [Gora] would, at this point, be untimely." In concluding that a motion to intervene would have been untimely on October 16, 2012, eight days before Gora brought his October 24, 2012 motion to intervene, the circuit court stated:

The [circuit court] turns to Buscher v. Boning, [No. 28943 (App. Jan. 25, 2011) (SDO)] ("In evaluating the timeliness of a motion to intervene, the court must consider 'the totality of circumstances, but especially relevant is: (1) the lapse of time between when [the proposed intervenor] should have sought intervention and when it actually did; and (2) the prejudice caused to the [parties] by the lapse of time.'["]). Plaintiffs filed the Complaint in this case on May 5, 2009, and the Writ of Possession and Judgment was filed on June 20, 2012. Defendants no longer reside at the Subject Property.

On October 24, 2012, Gora filed a "Notice of Appeal to the Circuit Court[,]" which included a "Motion to Intervene, Hawaii Rule [sic] of Civil Procedures [sic], Rule 24 (Notice/Motion);"² The circuit court denied the Notice/Motion on

² Rule 24(a) "Intervention of Right" provides:

Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to

October 31, 2012 referring to the reasoning that it previously set forth in its October 16, 2012 order as a basis for its denial.

On November 8, 2012, Gora filed a timely notice of appeal to this court.

On January 7, 2013, Kamehameha Schools filed a Motion to Dismiss Appeal or Affirm Orders. On April 11, 2013, this court issued an Order Denying the January 7, 2013 Motion to Dismiss Appeal determining it has jurisdiction over Gora's appeal "to the limited extent that the circuit court denied Appellant Gora's request to intervene in this case" pursuant to Hawaii Revised Statutes (HRS) § 641-1(a) (1993 & Supp. 2012).

II. STANDARD OF REVIEW

Motion to Intervene (intervention by right)

An order denying a motion to intervene pursuant to HRCF Rule 24(a)(2) is reviewed under the right/wrong standard. This court considers four factors in determining intervention as of right pursuant to HRCF Rule 24 (a)(2): (1) "whether the application was timely"; (2) "whether the intervenor claimed an interest relating to the property or transaction which was the subject of the action"; (3) "whether the disposition of the action would, as a practical matter, impair or impede the intervenor's ability to protect that interest"; and (4) "whether the intervenor's interest was inadequately represented by the existing defendants."

Hoopai v. Civil Serv. Comm'n, 106 Hawai'i 205, 216, 103 P.3d 365, 376 (2004) (citing Inq v. Acceptance Ins. Co., 76 Hawai'i 266, 271, 874 P.2d 1091, 1096 (1994)).

"Failure to meet even one [factor] prevents intervention 'by right' under HRCF Rule 24(a)(2)." Baehr v. Miike, 80 Hawai'i 341, 345, 910 P.2d 112, 116 (1996).

III. DISCUSSION

Gora fails to meet the first factor to intervene by right. The first factor considered in a motion to intervene

protect that interest, unless the applicant's interest is adequately represented by existing parties.

under HRCF Rule 24(a)(2) is whether the that motion was timely. Hoopai, 106 Hawai'i at 216, 103 P.3d at 376.

To determine whether the motion to intervene was timely, we must consider the totality of circumstances, but especially relevant is: (1) the lapse of time between when [applicants for intervention] should have sought intervention and when it actually did; and (2) the prejudice caused to the [parties] by the lapse of time.

Inq, 76 Hawai'i at 271, 874 P.2d at 1096.

"[M]otions to intervene filed after judgment has been entered are viewed with disfavor; and the moving party has a heavy burden to show facts or circumstances that justify intervention at that late date." Chierighino v. Bowers, 2 Haw. App. 291, 294, 631 P.2d 183, 186 (1981) (denying a motion to intervene because it was filed more than two years after judgment and "there [were] no circumstances justifying any delay at all . . .").

Gora filed his Notice/Motion on October 24, 2012, several months after the circuit court entered its judgment on June 20, 2012. Gora's attempt to intervene came nearly three years after Kamehameha Schools filed its complaint on May 7, 2009.

Gora's Notice/Motion expressly acknowledges the circuit courts' finding that his attempt to intervene was untimely ("Francis Gora's Motion came about three months after the filing of the Writ of Possession and Judgment of Possession and is considered untimely"), but he does not describe facts or circumstances justifying his belated attempt to intervene.

Granting Gora's Notice/Motion would result in prejudice against Kamehameha Schools, who has relied upon the finality of the circuit court's judgment as to its rights in the property and has obtained possession of the property.

IV. CONCLUSION

Because the circuit court did not err in denying Gora's motion to intervene, the "Order Denying Francis Gora's Notice of Appeal to the Circuit Court; Statement of the Case; Exhibit F; Designation of Record on Appeal; Order for Certification;

Transmission of Record; Motion to Intervene, Hawaii Rules of Civil Procedure, Rule 24; Motion for Clerical Mistakes, Hawaii Rules of Civil Procedure[] Rule 60" entered October 31, 2012 in the Circuit Court of the First Circuit is affirmed.

DATED: Honolulu, Hawai'i, October 9, 2013.

On the briefs:

Francis Keoua Gora
Real Party in Interest-
Appellant pro se.

Presiding Judge

Wayne Nasser
Gary P. Quiming
(Ashford & Wriston)
and
Cheryl A. Nakamura
(Rush Moore)
and

Associate Judge

Dennis W. Chong Kee
Calvert G. Chipchase
Teri-Ann E.S. Nagata
(Cades Schutte)
for Plaintiffs/Counterclaim-
Defendants/Appellees.

Associate Judge