IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

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THEODORE K. BLAKE, Petitioner/Plaintiff-Appellant,

vs.

COUNTY OF KAUAʻI PLANNING COMMISSION; COUNTY OF KAUAʻI PLANNING DEPARTMENT; IAN COSTA, in his official capacity as Planning Director; DEPARTMENT OF LAND AND NATURAL RESOURCES; WILLIAM J. AILA, Jr., in his official capacity as chair of the Department of Land and Natural Resources; and STACY T.J. WONG, as Successor Trustee of the Eric A. Knudsen Trust, Respondents/Defendants-Appellees.

SCWC-11-0000342

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CAAP-11-0000342; CIV. NO. 09-1-0069)

December 19, 2013

CONCURRING AND DISSENTING OPINION BY ACOBA, J.

I agree with the majority that all of the counts in the complaint are ripe for adjudication, and that the Circuit Court of the Fifth Circuit (the court) and the Intermediate Court of Appeals (ICA) erred in concluding otherwise. However, we should

resolve on appeal the parties' partial motions for summary judgment.[1]

I.

Previously, this court has ruled on a motion for summary judgment on appeal even though the trial court dismissed the motion without issuing a ruling on the merits. In Bush v. Watson, 81 Hawai'i 474, 918 P.2d 1130 (1996), the plaintiffs challenged various leases entered into by the defendants as invalid under the Hawaiian Homes Commission Act (HHCA). The trial court dismissed the plaintiffs' claims on the basis of sovereign immunity and res judicata. Id. at 478, 918 P.2d at 1134. Apparently on the same basis, the trial court granted the defendants' motion for summary judgment as to the plaintiff's claims that the various leases were invalid. Id.

This court held that the trial court erred in dismissing the case based on sovereign immunity and res judicata.

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[1] On July 21, 2010, Petitioner/Plaintiff-Appellant Theodore K. Blake (Blake) filed a motion for partial summary judgment as to Counts 1-6 and a second motion for partial summary judgment as to Counts 7-8.

On October 6, 2010, Respondent/Defendant-Appellee the Eric A. Knudsen Trust (Knudsen) filed a motion for partial summary judgment as to Count 3, a second motion for partial summary judgment as to Count 4, a third motion for partial summary judgment as to Count 6, and a fourth motion for partial summary judgment as to Counts 7 and 8. Kundsen also filed a motion for partial summary judgment as to Counts 1, 2, and 5, because it asserted that those Counts did not apply to Knudsen.

On October 7, 2010, Respondent/Defendant-Appellees the Department of Land and Natural Resources and Laura Thielen in her official capacity as chair of the Department of Land and Natural Resources (collectively, the State) filed a motion for summary judgment, arguing that Blake's claims were not ripe, that it was entitled to summary judgment on Counts 1, 3, 4, and 6, and that Counts 2, 5, 7, and 8 did not apply to the State.

The court granted the State's motion for summary judgment after concluding it lacked subject matter jurisdiction because the case was not ripe, as argued by the State. The court therefore did not discuss the arguments contained in any of the partial motions for summary judgment.

Id. at 479-82, 918 P.2d at 1135-38. Further, even though the trial court apparently did not rule on the issue of whether the contracts challenged by the plaintiffs violated the HHCA, this court resolved that issue on summary judgment grounds on appeal and concluded that the contracts were precluded by the HHCA.[2] Id. at 487, 918 P.2d at 1143. Thus, the court's order granting summary judgment to the defendants was vacated and the case remanded with instructions to enter an order granting summary judgment to the plaintiffs. Id. Additionally, this court has previously resolved appeals from a summary judgment by granting summary judgment to the nonmoving party, even though that party did not request summary judgment before the trial court. See, e.g., Flint v. MacKenzie, 53 Haw. 672, 673, 501 P.2d 357, 358 (1972) ("Clearly, the trial court should be allowed to enter summary judgment for the non-moving party, and . . . this court is likewise empowered[.]").

This court's decision in Bush to grant summary judgment is consistent with this court's precedent regarding the appellate courts' power to resolve issues on appeal. It is well-established that we may decide questions of law even when those questions were not reached by the trial court. Gregg Kendall &

[2] Similarly, in Chase Manhattan Bank, N.A. v. Am. Nat'l Bank and Trust Co. of Chicago, 93 F.3d 1064 (2d. Cir 1996), the trial court dismissed a case for failing to meet the amount in controversy requirement of diversity jurisdiction without ruling on the parties' motions for summary judgment. Nevertheless, the Second Circuit discussed the summary judgment motions, reasoning "if we find that a party must prevail as a matter of law, a remand is unnecessary." Chase Manhattan, 93 F.3d at 1072.

Assocs., Inc. v. Kauhi, 53 Haw. 88, 94, 488 P.2d 136, 141 (1971); see also Kienker v. Bauer, 110 Hawai‘i 97, 115, 129 P.3d 1125, 1143 (2006), superseded by statute as stated in Kaho’ohanohano v. Dep’t of Human Servs., 117 Hawai‘i 262, 310, 178 P.3d 538, 586 (2008) (ruling on "the question of whether [Hawai‘i Revised Statutes (HRS)] § 663-10.5 superseded HRS § 663-10.9(1)" even though "the court never ruled on the issue" because it was "an issue of law that can be determined by this court without remand"); Kau v. City and County of Honolulu, 104 Hawai‘i 468, 479, 92 P.3d 477, 488 (2004) (holding that the ICA erred in remanding the issue of whether a condemnation "fulfilled the requisite public purpose of [Revised Ordinances of Honolulu] chapter 38" to the trial court because that "issue presents a question of law"); In re Estate of Magoon, 58 Haw. 345, 354, 569 P.2d 884, 891 (1977) (noting that "[t]he trial court never ruled on the issue of the admissibility of evidence of [federal estate tax values]," but concluding that this court could rule on the issue because it was a question of law); cf. Chase Manhattan, 93 F.3d at 1072 ("An appellate court has the power to decide cases on appeal if the facts in the record adequately support the proper result." (internal quotation marks omitted)).

Kauhi is instructive. In Kauhi, the defendant requested the trial court to compel arbitration. 53 Haw. at 88, 488 P.2d at 139. The trial court ruled that the defendant had waived his right to arbitration and did not reach the issue of

whether the contract containing an arbitration clause governed the dispute. Id. at 94, 488 P.2d at 141. This court noted that "ordinarily the issue would be remanded to the trial court for its resolution." Id. However, because "no factual questions [were] involved," but instead the issue was "a question of law which must ultimately be decided by this court," Kauhi held that "in the furtherance of justice, the issue should be determined by this court without remand."[3] Id.

Similarly, in Bauer, the trial court ruled that the State and another defendant were liable for negligently causing the plaintiff's vehicular collision. 110 Hawai'i at 102, 129 P.3d at 1130. The trial court imposed joint and several liability on the State and its co-defendant for the non-economic damages suffered by the plaintiff. Id. at 103, 129 P.3d at 1131. However, the trial court did not impose joint and several liability on the State and its codefendant for the economic

[3] The majority's citation to Kaleikini v. Yoshioka, 128 Hawai'i 53, 283 P.3d 60 (2012) in support of its decision not to resolve the parties' motions for partial summary judgment, majority opinion at 13 n.7, is distinguishable. In Kaleikini, this court overturned the court's order granting summary judgment in favor of the defendants because the circuit court incorrectly determined that "phasing of a historic preservation review process is permissible." Id. at 88, 283 P.3d at 81. Nevertheless, this court declined to consider the plaintiff's arguments that summary judgment should be entered in her favor because, inter alia, "additional information may have become available," and "it is not clear what impact those additional facts may have." Id. Here, in contrast, the parties have stated that no additional information is necessary. At oral argument, Kudnsen stated that the present record was sufficient, and that it was not necessary for this court to consider any additional facts developed while the case was pending on appeal. Oral Argument at 58:45, Blake v. County of Kaua'i Planning Commission, No. SCWC-11-0000342, available at http://state.hi.us/jud/oa/13/SCOA_032113_11_342.mp3. Accordingly, Kaleikini is inapplicable here.

damages suffered by the plaintiff, apparently because it believed that HRS § 663-10.5 "had abolished the State's joint and several liability." Id. at 102, 129 P.3d at 1130.

On appeal, we determined that the State and its codefendant were jointly and severally liable for the plaintiff's economic damages under HRS § 663-10.9(1), and that HRS § 663-10.9(1) had not been superseded by HRS § 663-10.9(1). Id. at 116, 129 P.2d at 1144. It was pointed out that the trial court "never ruled on the issue of whether HRS § 633-10.5 superseded HRS § 663-10.9(1)." Id. at 115, 129 P.3d at 1143. Nevertheless, we held that "'in the furtherance of justice,'" questions of law "'which must ultimately be decided by this court . . . should be determined . . . without remand[.]'" Id. (quoting Kauhi, 53 Haw. at 94, 448 P.2d at 141). Inasmuch as the issue of whether HRS § 663-10.5 superseded HRS § 663-10.9(1) was a question of law, it could be "determined by this court without remand." Id.

Likewise, in Flint the defendant filed a motion for rehearing based in part on two letters, one of which had not been presented to the trial court. 53 Haw. at 673, 501 P.2d at 358. This court explained that "[t]o remand the case for lower court consideration of these letters, just to have the case reappear here where the conclusion reached by this court must necessarily be the same, would not be judicially expedient." Id. Flint therefore held that "[a]lthough the letters referred to were not explicitly argued before this court previously, the court has

reviewed them and confirms its opinion that neither letter [was material to the summary judgment motion]." Id.

II.

The majority states that it "declines to decide whether partial summary judgment should be entered in favor of either party" because "the claims at issue arise out of a complex set of facts that have not yet been considered by the [court]." Majority opinion at 13 n.7. However, here all the briefs have been filed with respect to the partial motions for summary judgment. Inasmuch as the court will consider the same record that is now presented to us, there is no reason to delay disposition of these motions. In the instant case, the parties agree that their partial motions for summary judgment may be decided on the present record. At oral argument, Blake stated that his partial motions for summary judgment presented issues that were "purely legal," and that "there were no material facts that [were] controverted." Oral Argument at 17:45, Blake v. County of Kauaʻi Planning Commission, No. SCWC-11-0000342, available at http://state.hi.us/jud/oa/13/SCOA_032113_11_342.mp3.

For example, Count 3 alleged that Respondents violated the historic review process set forth in Hawaiʻi Administrative Rules (HAR) Title 13 Chapter 284. Blake related that in this regard, there were admissions from the parties that there was no document determining the effects of the project on significant historic property, and admissions that no mitigation plan was

approved prior to final subdivision approval. Id. at 18:00. These facts apparently formed the basis of Blake's contention that the defendants did not follow the historic review process. Id. at 18:10.

Similarly, as to Count 5, Blake alleged that Respondent/Defendant-Appellee County of Kauaʻi Planning Commission did not fully consider historic and cultural values as required by HRS Chapter 205A prior to approving the project. Blake maintained that it was uncontroverted that the County neglected to review archeological studies, including a 1978 study referencing the applicable zoning ordinance, and these facts formed the basis of Blake's claim that the County did not adequately consider cultural and historic values. Id. at 18:40

As to Count 2, which alleged that the State and the County failed to thoroughly protect Native Hawaiian rights, Blake asserted that there was an admission that the County had failed to investigate and to make findings regarding Native Hawaiian practices. Id. at 19:00. Finally, as to Count 7, which alleged that Knudsen caused a public nuisance by altering "Hapa Trail" and destroying historic sites, Blake maintained that it was uncontroverted that eighteen historic sites were destroyed. Id. at 19:45. The destruction of the historic sites apparently formed the basis of Blake's public nuisance action. Id.

None of the Respondents challenged Blake's position that the facts were uncontroverted and therefore the issues

remaining were "purely legal." To the contrary, Knudsen agreed that the record was sufficient for us to rule on summary judgment. Id. at 59:25. Thus, the Respondents apparently accepted Blake's position that this court could rule on his partial motions for summary judgment.

Moreover, Knudsen also gave specific examples of Counts that could be resolved as a matter of law. As to Count 7, Knudsen asserted that its position was that there was no cause of action for nuisance under these circumstances, and that the question was therefore a "question of law." Id. at 1:00:48. Additionally, Knudsen maintained that Count 7 failed as a matter of law because there was no evidence of injury in fact to Blake. Id. at 53:55. Similarly, Knudsen argued that Count 8 failed as a matter of law because there was no evidence of injury in fact. Id.

Hence, the parties maintain that there are no controverted issues of material fact that preclude summary judgment on appeal. The issue of whether any party is "entitled to summary judgment is a question of law." City and County of Honolulu v. F.E. Trotter, Inc., 70 Haw. 18, 21, 757 P.2d 647, 649 (1988). Thus, this court should resolve the partial motions for summary judgment filed by Blake as he requested in his Application. We are "in the same position as the trial court when reviewing a motion for summary judgment." GGS Co., Ltd. v. Masuda, 82 Hawai'i 96, 104, 919 P.2d 1008, 1016 (App. 1996).

Inasmuch as the evidence on summary judgment as presented to the trial court consisted solely of written materials, the record presented to us is identical to the record that will be presented to the court on remand. As explained supra, here the parties agree that there are no controverted issues of material fact but instead the parties' motions for partial summary judgment present questions of law that may be decided by this court. Because we must ultimately decide questions of law, Bauer, 110 Hawai‘i at 115, 129 P.3d at 1143, remand to the court is not necessary. See Flint II, 53 Haw. at 673, 501 P.2d at 358. In the interests of judicial economy, the prompt resolution of cases, the parties' acknowledgment that only issues of law are posed, and "in the furtherance of justice," the parties' partial motions for summary judgment "should be [decided] by this court without remand." Kauhi, 53 Haw. at 94, 488 P.2d at 141.

/s/ Simeon R. Acoba, Jr.