

**Electronically Filed
Intermediate Court of Appeals
29702
14-FEB-2013
09:01 AM**

NO. 29702

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAII

WAHI HO'OMALU LIMITED PARTNERSHIP, a Hawai'i
limited partnership, Plaintiff-Appellee,

v.

HENRY MAIO, JR., Defendant-Appellant

and

HEIRS OR ASSIGNS OF KEKINO(w) ET AL., Defendants-Appellees

APPEAL FROM THE CIRCUIT COURT OF THE SECOND CIRCUIT
(CIVIL NO. 06-1-0140(3))

SUMMARY DISPOSITION ORDER

(By: Nakamura, C.J., Foley and Fujise, JJ.)

Defendant-Appellant Henry Maio Jr. (Maio) appeals from the February 9, 2009 Final Judgment and Decree (Judgment) entered in the Circuit Court of the Second Circuit¹ (circuit court) pursuant to the November 5, 2008 Order Granting Plaintiff's Motion for Summary Judgment and the February 9, 2009 Findings of Facts and Conclusions of Law (FOFs/COLs). The Judgment, entered *inter alia*, gave fee simple title ownership to a parcel of land, described as Apana 1 of Royal Patent Number 3215, Land Commission Award (LCA) Number 2468 to Keau bearing Tax Map Key (TMK) designation (2) 3-3-02-01 to Plaintiff-Appellee Wahi Ho'omalua Limited Partnership (WHLPL).

¹ The Honorable Joseph E. Cardoza presided.

Maio argues the circuit court erred in granting WHLP's motion for summary judgment because there are genuine issues of material fact regarding the meaning of the language in the Mai deed, whether Mai was the brother of Pala, whether Mai owned LCA 2468:1 at the time the 1892 Mai to J.W. Kalua deed was signed, in whether the proper heirs were summoned, and with the maps provided by WHLP.

Upon careful review of the record and the briefs submitted by the parties and having given due consideration to the arguments advanced and the issues raised by the parties, as well as the relevant statutory and case law, we conclude Maio's appeal is without merit.

[An appellate] court reviews a trial court's grant of summary judgment de novo. O'ahu Transit Servs., Inc. v. Northfield Ins. Co., 107 Hawai'i 231, 234, 112 P.3d 717, 720 (2005). The standard for granting a motion for summary judgment is well settled:

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. A fact is material if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or defense asserted by the parties. The evidence must be viewed in the light most favorable to the non-moving party. In other words, [the appellate court] must view all of the evidence and the inferences drawn therefrom in the light most favorable to the party opposing the motion.

Price v. AIG Hawai'i Ins. Co., 107 Hawai'i 106, 110, 111 P.3d 1, 5 (2005) (original brackets and citation omitted).

Kamaka v. Goodsill Anderson Quinn & Stifel, 117 Hawai'i 92, 104, 176 P.3d 91, 103 (2008).

Maio must demonstrate that there were genuine issues of material fact. Omerod v. Heirs of Kaheananui, 116 Hawai'i 239, 261, 172 P.3d 983, 1005 (2007). However, Maio does not do this.

During the hearing on WHLP's motion for summary judgment, Maio stated that he objected to the WHLP's contention that he only had an interest in LCA 2468:1 TMK (2) 3-3-02-14.

Maio stated that he had an undivided interest in the whole of LCA 2468:1² and questioned the validity of the survey maps submitted by WHLP. Maio argued that the circuit court should not rely on the TMK system because that system began in 1904 and because the dimensions of LCA 2468:1 cannot change and be divided by TMKs as "no surveyor or court has the authority to alter or modify a line once it is created[,] " referring to the original boundary lines determined when LCA 2468 was awarded.

WHLP argued that it satisfied its burden by showing that WHLP had superior title to any other title for LCA 2468:1 TMK (2) 3-3-02-01 and that Maio only has title to LCA 2468:1 TMK (2) 3-3-02-14 and no interest in LCA 2468:1 TMK (2) 3-3-02-01. WHLP argued the only experts involved in this case were WHLP's experts. The defendants, including Maio, did not submit testimony to the circuit court which countered WHLP's experts' declarations which included metes and bounds, property descriptions and maps, and WHLP's chain of title. WHLP argued it proved a complete chain of title to LCA 2648:1 TMK (2) 3-3-02-01 and there was no factual dispute. WHLP argued that because Maio specifically stated in his June 14, 2007 Opposition to Motion for Summary Judgment that he had title in LCA 2468:1 TMK (2) 3-3-02-14, which is a portion of land that WHLP is not claiming to own, there was "no factual dispute" and "no genuine issue."

The court granted WHLP's motion for summary judgment as to LCA 2468:1 TMK (2)3-3-02-01. In its February 9, 2009 FOFs/COLs, the circuit court found in relevant part the following:

FINDINGS OF FACT

.

² At some point portions of LCA 2468:1 were assigned at least two different TMKs, TMK (2) 3-3-02-1 and TMK (2) 3-3-02-14.

10. [Maio] . . . claim[s] to own the portion of LCA 2468:1 located in [TMK] (2)3-3-02-14, land not claimed by the [WHLP] in this case[.]

. . . .

13. [WHLP] has presented admissible evidence in the form of certified documents, and has presented the Affidavit of expert title abstractor and long searcher Collen Uahinui, from Title Guaranty, who provided detailed information on the chains of title of the eleven [LCAs] in this case, and has presented survey descriptions and map from expert surveyor Eduardo Valera.

. . . .

CONCLUSIONS OF LAW

1. [Maio] has [not] set forth specific facts to [WHLP's] Motion for Summary Judgment, showing that there is a genuine issue for trial, so that [Maio] has [not] raised a genuine issue as to any material fact, and based upon the evidence presented, [WHLP] is entitled to a judgment as a matter of law, all as required by HRCF Rule 56.

2. [WHLP] has proved that it has a good and complete chain of title, by deed and inheritance, in fee simple absolute, free and clear of all claims, lines, clouds and encumbrances . . . to the following parcels of real property:

. . . .

B(a) All of that certain parcel of land (being a portion of Apana 1 . . . [LCA] Number 2468 . . .) . . . bearing the [TMK] designation (2) [3-3-02-01], containing an area of 0.433 acre and 0.886 acre[.]

B(b) All of that certain parcel of land (being all of Apana 2 . . . [LCA] Number 2468 . . .) . . . bearing Tax Key designation (2)3-3-02-01, containing an area of 0.465 acre, more or less[.]

None of these FOFs/COLs are specifically challenged on appeal, as such, we accept these FOFs/COLs as binding in this appeal. Okada Trucking Co., Ltd. v. Bd. of Water Supply, 97 Hawai'i 450, 458, 40 P.3d 73, 81 (2002); Alvarez Family Trust v. Ass'n of Apartment Owners of Kaanapali Alii, 121 Hawai'i 474, 489, 221 P.3d 452, 467 (2009).

Maio argues there are genuine issues of fact regarding the meaning of language in the Mai deed, whether Mai was the brother of Pala, and whether Mai owned LCA 2468: Apana 1 at the time the 1892 Mai to J.W. Kalua deed was signed. However, Maio does not state where in the record there is any evidence offered in opposition to WHLP's motion for summary judgment to create a genuine issue of material fact, and we find none.

Maio also argues there is a "question on specific parcel and if the proper heirs were summoned." The only part of Maio's opening brief which arguably pertains to this argument is the following sentence: "[WHLP] should not summon heirs to court on parcels, LCA, RP, and then say they are not quieting the title on a specific piece within the whole." Maio fails to give any citations to authority to support his position, and we find none.

Finally, Maio argues the circuit court erred in granting WHLP's motion for summary judgment because there is a genuine issue of material fact regarding the maps provided by WHLP. Maio asserts that "each time map changes depending on the discrepancy found within the placement of parcels on the map." Specifically, Maio argues that the survey of LCA 2468:1, provided by WHLP, shows three separate parcels, but that WHLP does not prove how there were three parcels. He also contends that "[t]he Royal Patent Land Commission Award is surveyed original superior title. boundaries [sic] can not be altered or re-surveyed replacing the whole."

The maps which Maio contends are incorrect were originally filed with WHLP's December 31, 2007 Additional Supplement to Motion for Summary Judgment. Specifically, WHLP filed a declaration of Hawai'i licensed land surveyor Edgardo Valera (Valera), a map of the land that Valera surveys as being is located in LCA 2468:1 TMK (2) 3-3-02-14 and a metes and bounds survey description of LCA 2468:1 TMK (2) 3-3-02-14.

NOT FOR PUBLICATION IN WEST'S HAWAII REPORTS AND PACIFIC REPORTER

On May 19, 2008, WHLP filed the Submission of Survey Map and Descriptions of LCA 2468:1, which included a map of LCA 2468:1 depicting the placement of the land in LCA 2468:1 that falls under TMK (2)3-3-02-01, TMK (2) 3-3-02-14, or TMK (2) 3-3-02-26, as well as three metes and bounds descriptions of the land in the previously mentioned tax maps. Valera created both the map and the descriptions.

Conversely, Maio did not file a declaration consisting of his own personal knowledge regarding the metes and bounds of LCA 2468:1 or the parcel placement within LCA 2468:1. Maio also did not retain his own surveyor to challenge the declaration of WHLP's surveyor. It appears Maio is relying on the information contained in his pleadings to rebut the maps and descriptions created by WHLP's expert, Valera. However, Maio cannot rely on his unverified pleadings to oppose WHLP's motion for summary judgment because pleadings are not evidence within the scope of the summary judgment rule. See Tri-S Corp. v. Western World Ins. Co., 110 Hawai'i 473, 494 n.9, 135 P.3d 82, 103 n.9 (2006). Under Hawai'i Rules of Civil Procedure (HRCPP) Rule 56(e), in order for Maio to have properly rebutted WHLP's evidence regarding the placement of the TMKs within LCA 2468:1, which included maps, descriptions of LCA 2468:1, and a declaration by an expert, Maio needed to respond by filing opposing affidavits or a declaration which "shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify[.]" HRCPP Rule 56(e). Maio failed to respond as required under HRCPP Rule 56(e).

The circuit court properly granted WHLP's motion for summary judgment against Maio.

Therefore,

IT IS HEREBY ORDERED that the February 9, 2009 Final Judgment and Decree entered in the Circuit Court of the Second


NOT FOR PUBLICATION IN WEST'S HAWAII REPORTS AND PACIFIC REPORTER

Circuit pursuant to the November 5, 2008 Order Granting Plaintiff's Motion for Summary Judgment and the February 9, 2009 Findings of Facts and Conclusions of Law is affirmed.

DATED: Honolulu, Hawai'i, February 14, 2013.

On the briefs:

Henry Maio, Jr.
Defendant-Appellant pro se.


Chief Judge

Tom C. Leuteneker
(Carlsmith Ball)
for Plaintiff-Appellee.


Associate Judge


Associate Judge