

NO. CAAP-14-0000758

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAII

WHEELS OF JUSTICE, LLC,
a Nevada limited liability company,
Plaintiff-Appellant,

v.

TITLE GUARANTY ESCROW SERVICES, INC.,
Defendant/Cross-Claim Defendant/Cross-Claimant-Appellee;
ISLAND TITLE CORPORATION,
Defendant/Cross-Claimant/Cross-Claim Defendant-Appellee;
CLINTON HINCHCLIFF, JR.; CLINTON HINCHCLIFF, SR.;
HINCHCLIFF INVESTMENTS, LLC,
Defendants/Cross-Claim Defendants-Appellees;
and
JOHN AND JANE DOES 1-20; DOE CORPORATIONS,
PARTNERSHIPS AND/OR OTHER ENTITIES 1-20,
Defendants

and

ISLAND TITLE CORPORATION and
TITLE GUARANTY ESCROW SERVICES, INC.,
Third-Party Plaintiffs-Appellees,

v.

NIMBLE LAND, INC.,
Third-Party Defendant-Appellee

and

NIMBLE LAND, INC.,
Cross-Claimant-Appellee,

v.

CLINTON HINCHCLIFF, JR.; CLINTON HINCHCLIFF, SR.;
HINCHCLIFF INVESTMENTS, LLC,
Cross-Claim Defendants-Appellees

APPEAL FROM THE CIRCUIT COURT OF THE THIRD CIRCUIT
(CIVIL NO. 09-1-0178K)

SUMMARY DISPOSITION ORDER

(By: Nakamura, C.J., and Leonard and Reifurth, JJ.)

In this appeal related to the sale of property in Kona Hawai'i (the "Property"), Plaintiff-Appellant Wheels of Justice, LLC appeals from the (1) March 13, 2014 Final Judgment, (2) the March 13, 2014 Order Granting Third-Party Defendant Nimble Land, Inc.'s Motion to Expunge Notice of Pendency of Action ("March 13, 2014 Expunge Order"), and (3) the May 6, 2014 Order Denying Plaintiff's Motion for Reconsideration (*Filed on March 28, 2014*) of the Order Filed March 13, 2014 Granting Nimble Land, Inc.'s Motion to Expunge Notice of Pendency of Action and for Attorney's Fees and Costs and the Final Judgment Filed March 13, 2014, entered by the Circuit Court of the Third Circuit ("Circuit Court").^{1/} The judgment and orders were entered against Wheels of Justice and in favor of Defendant/Cross-Claim Defendant/Cross-Claimant/Third-Party Plaintiff-Appellee Title Guaranty Escrow Services, Inc.; Defendant/Cross-Claimant/Cross-Claim Defendant/Third-Party Plaintiff-Appellee Island Title Corporation; Defendants/Cross-Claim Defendants-Appellees Clinton Hinchcliff, Jr., Clinton Hinchcliff, Sr., and Hinchcliff Investments, LLC; and Third-Party Defendant/Cross-Claimant-Appellee Nimble Land, Inc.

On appeal, Wheels of Justice contends that the Circuit Court committed reversible error when it: (1) failed to properly notify Wheels of Justice's counsel of the order dismissing the case pursuant to Rule 12(q) of the Rules of the Circuit Courts of the State of Hawai'i ("RCCH"); (2) denied Wheels of Justice's motion to set aside the order of dismissal; (3) denied Wheels of Justice's second request to set aside the order of dismissal; (4) entered the Final Judgment and the March 13, 2014 Expunge Order; and (5) denied Wheels of Justice's motion for reconsideration of the March 13, 2014 Expunge Order.

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, we resolve Wheels of Justice's appeal and vacate and remand the judgment.

^{1/} The Honorable Ronald Ibarra presided.

Wheels of Justice asserts in its second point of error that the Circuit Court erred when it denied Wheels of Justice's motion to set aside the order of dismissal. "[W]here a court *sua sponte* issues an order of dismissal for want of prosecution, its action is reviewable on appeal for abuse of discretion." *Ryan v. Palmer*, 130 Hawai'i, 321, 323, 310 P.3d 1022, 1024 (App. 2013) (quoting *Compass Dev., Inc. v. Blevins*, 10 Haw. App. 388, 397-98, 876 P.2d 1335, 1340 (1994)) (acknowledging that this standard of review applies to an order denying a motion to set aside).

RCCH Rule 12(q)'s language is patterned after Hawai'i Rules of Civil Procedure ("HRCP") Rule 41(b)(2). *Ryan*, 130 Hawai'i at 323, 310 P.3d at 1024. Under HRCP Rule 41(b)(2), a dismissal with prejudice is a "severe sanction" of "last resort" that cannot be affirmed "*absent deliberate delay, contumacious conduct, or actual prejudice*." *Id.* (emphasis added) (quoting *In re Blaisdell*, 125 Hawai'i 44, 49, 252 P.3d 63, 68 (2011)).

"[A]bsent a clear record of delay or contumacious conduct, 'the careful exercise of judicial discretion requires that a [trial] court consider less severe sanctions [than dismissal] *and explain, where not obvious, their inadequacy for promoting the interests of justice.*'" *Blaisdell*, 125 Hawai'i at 49, 252 P.3d at 68 (quoting *Schilling v. Walworth Cty. Park & Planning Comm'n*, 805 F.2d 272, 275 (7th Cir. 1986)). The Circuit Court made no findings of deliberate delay, contumacious conduct, or actual prejudice and offered no express considerations of less severe sanctions.

Based on the record and the governing case law, we are compelled to conclude that the Circuit Court abused its discretion in dismissing the case with prejudice solely for Wheels of Justice's failure to file a timely pretrial statement, in failing to apply the *Blaisdell* factors in dismissing the case, and in failing to explain why less severe sanctions were insufficient.

Based on the foregoing, we vacate the March 13, 2014 Final Judgment and remand the case to the Circuit Court for proceedings consistent with this order. On remand, the Circuit Court is directed to reconsider its March 13, 2014 Order Granting Third-Party Defendant Nimble Land, Inc.'s Motion to Expunge

Notice of Pendency of Action in light of our decision to vacate the Final Judgment and the current status of the Property.

DATED: Honolulu, Hawai'i, May 10, 2017.

On the briefs:

Chief Judge

R. Steven Geshell
for Plaintiff-Appellant

Associate Judge

Charles A. Price
(Koshiha Price Gruebner & Mau)
for Defendant/Cross-Claim
Defendant/Cross-Claimant/Third-
Party Plaintiff-Appellee Title
Guaranty Escrow Services,
Inc.

Associate Judge

David J. Minkin,
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for Defendant/Cross-Claimant/
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Peter Knapman
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for Defendants/Cross-Claim
Defendants-Appellees Clinton
Hinchcliff, Jr., Clinton
Hinchcliff, Sr., and Hinchcliff
Investments, LLC.

John R. Remis, Jr.
for Third-Party Defendant/Cross-
Claimant-Appellee Nimble Land,
Inc.