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NO. CAAP-14-0001347

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

STACY S.K. HIGA and JANICE M.N. HIGA,
Plaintiffs/Appellants/Cross-Appellees,

v.

COUNTY OF HAWAII, LINCOLN ASHIDA,
as the Corporation Counsel for the County of Hawaii,
Defendants/Appellees/Cross-Appellants,

and

JOHN DOES 1-100, JANE DOES 1-100,
DOE PARTNERSHIPS 1-100, DOE CORPORATIONS 1-100,
DOE GOVERNMENTAL ENTITIES 1-100, and DOE ENTITIES 1-100,
Defendants

APPEAL FROM THE CIRCUIT COURT OF THE THIRD CIRCUIT
(CIVIL NO. 08-1-0293)

MEMORANDUM OPINION

(By: Fujise, Acting C.J., Reifurth and Ginoza, JJ.)

Plaintiffs-Appellants/Cross-Appellees Stacy S.K. Higa (**Higa**) and Janice M.N. Higa (collectively, **the Higas**) appeal from the Judgment entered on November 24, 2014, and challenge the "Order Granting Defendants County of Hawaii and Lincoln Ashida, as the Corporation Counsel for the County of Hawaii's Motion for Summary Judgment" entered on May 15, 2014 (**Order Granting Summary Judgment**), both filed in the Circuit Court of the Third Circuit (**circuit court**).¹

On appeal, the Higas contend that the circuit court erred when it granted summary judgment for Defendants-Appellees/Cross-Appellants County of Hawaii (**County**) and Lincoln

¹ The Honorable Glenn S. Hara presided.

Ashida, as the Corporation Counsel for the County of Hawai'i (Ashida),² (collectively, the **County Defendants**), because there were genuine issues of material fact precluding summary judgment.

County Defendants filed a cross-appeal and challenge the circuit court's "Order Denying [County Defendants'] Motion for Award of Attorneys' Fees and Costs" (**Order Denying Fees**), filed on October 20, 2014. County Defendants contend that the circuit court abused its discretion when it held that the claims in the Higas' verified complaint sounded in tort rather than assumpsit, and therefore ruled that the County Defendants were not entitled to attorneys' fees pursuant to Hawaii Revised Statutes (HRS) § 607-14 (2016).

For the reasons discussed below, we affirm.

I. The Higas' Appeal

In reviewing the Higas' challenges to the circuit court's Order Granting Summary Judgment, we apply the following standard of review:

[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).

² Ashida is named in his official capacity as the Corporation Counsel for the County of Hawai'i during the relevant period of this case. The Higas' verified complaint refers, at times, to Ashida and his subordinates collectively as "Corporation Counsel." Our references to "Corporation Counsel" herein refer to the County of Hawai'i Office of the Corporation Counsel.

This case stems from an underlying proceeding before the U.S. Equal Employment Opportunity Commission (**EEOC**) in which Melissa Chang (**Chang**), a former Legislative Assistant for the Hawai'i County Council, brought a charge of discrimination against the County based on certain alleged conduct by, among others, Higa while he was Chair of the Hawai'i County Council. Chang also alleged improper conduct by another County Council member and the County Clerk (**EEOC case**). Corporation Counsel represented the County in the EEOC case. After an initial ruling adverse to the County, the EEOC case was settled.

The Higas subsequently brought this action against the County and Ashida. Count I of the Higas' verified complaint asserts a cause of action for "negligence/legal malpractice" alleging, *inter alia*, that: an attorney-client relationship existed between Higa and Corporation Counsel with regard to the EEOC case; Corporation Counsel owed a duty of care and skill to Higa; Corporation Counsel negligently breached their duty by failing to advise Higa about potential conflicts, obtain a waiver of potential conflicts, or advise Higa of his right to obtain independent counsel (collectively, **Conflict Issues**); and Higa's reputation was damaged because he was unable to intervene at the EEOC hearing with his own counsel and defend himself.

Count II in the verified complaint asserts a cause of action for breach of contract asserting, *inter alia*, that: the Hawai'i County Charter mandated that Corporation Counsel provide counsel for County Council members sued in their employment capacity; Corporation Counsel was obligated to exercise the knowledge, skill, and ability ordinarily possessed by members of the legal profession; Corporation Counsel was required to advise Higa about the Conflict Issues in the EEOC case; and as a result of the failure to notify Higa of the Conflict Issues he suffered injury to his reputation and other damages.³

³ During the litigation of this case, Higa claimed, *inter alia*, that his chances for being elected Mayor were affected by the EEOC case being made public.

Count III in the verified complaint asserts a cause of action for breach of fiduciary duty/conflict of interest alleging, *inter alia*, that: Corporation Counsel "acted in a fiduciary relationship to Higa as his attorney[,]" which included an attendant duty of loyalty to ensure there were no conflicts of interest; Corporation Counsel failed to advise Higa of any conflicts of interest, allow Higa to waive any conflict, or seek to withdraw from representing Higa; and as a result the Higas suffered damages.

Although couched as three different causes of action, Counts I through III are each grounded in the allegations that Corporation Counsel breached duties or obligations owed to Higa due to an attorney-client relationship. This is reinforced by the Higas' own presentation of the issues in their appellate briefing, which addresses their causes of action under Counts I through III in similar fashion, *i.e.*, that an attorney-client relationship existed between Higa and Corporation Counsel, that Higa should have been allowed to intervene in the EEOC litigation due to conflicts with the County or other County Council members, and that the Higas suffered damages because Corporation Counsel failed to properly represent Higa in the EEOC case.

In short, we view Counts I through III as each asserting a legal malpractice claim and will address them together as such for purposes of reviewing the summary judgment ruling. The Higas' derivative claim set forth in Count IV is addressed separately.

A. Legal Malpractice

As established by the Hawai'i Supreme Court in Thomas v. Kidani,

The elements of an action for legal malpractice are: (1) the parties had an attorney-client relationship, (2) the defendant committed a negligent act or omission constituting breach of that duty, (3) there is a causal connection between the breach and the plaintiff's injury, and (4) the plaintiff suffered actual loss or damages.

126 Hawai'i 125, 129, 267 P.3d 1230, 1234 (2011) (citations omitted). The supreme court further expressed that "[t]he

causation element of legal malpractice is often thought of as requiring a plaintiff to litigate a 'trial within a trial.'" Id. (citation omitted). That is, to prove causation, a plaintiff in a legal malpractice action must show "both the attorney's negligence and also what the outcome of the mishandled litigation would have been if it had been properly tried." Id. (citation omitted). In Thomas, the supreme court held that the legal malpractice plaintiff had the burden to prove that her prior attorney had failed to present a certain legal theory when he had represented her, and that plaintiff would have prevailed in the prior case if the attorney had presented the legal theory. Id.

In this case, therefore, the Higas have the burden of proof at trial under the standards for establishing legal malpractice set forth in Thomas. For purposes of reviewing the circuit court's summary judgment ruling in this case, we also consider the following:

where the non-movant bears the burden of proof at trial, a movant may demonstrate that there is no genuine issue of material fact by either: (1) presenting evidence negating an element of the non-movant's claim, or (2) demonstrating that the non-movant will be unable to carry his or her burden of proof at trial.

Ralston v. Yim, 129 Hawai'i 46, 57, 292 P.3d 1276, 1287 (2013) (emphasis added).

Given the record in this case, and based on our *de novo* review, we conclude that the first circumstance described in Ralston applies here. That is, the County Defendants demonstrated there is no genuine issue of material fact by presenting evidence with their summary judgment motion negating an element -- the causation element -- of non-movant Higa's legal malpractice claim. In turn, once the burden shifted to Higa, he failed to present any counter evidence showing that there were genuine issues of material fact for trial on the causation element.

One of the exhibits attached to the County Defendants' summary judgment motion is the deposition testimony of Higa in which he testified, *inter alia*, about the bases for his claims.

Higa testified that he had wanted to intervene in the EEOC case, stating in relevant part:

Hey, I was trying to intervene to correct -- or what I consider wrong, okay. That's what I'm getting -- that's what this lawsuit is about, that I think your guys or whoever it was screwed up, never gave us a chance to go through the process and do this thing correctly.

Although Higa was a witness in the EEOC case and, among other things, was prepared for his testimony in that matter by Corporation Counsel attorneys, he was never named as a party. When asked what difference it would have made if he was a party, Higa testified that he would have brought in experts "in this field of litigation[.]" However, he could not provide any explanation as to how the outcome in the EEOC case would have been better for him. When asked if he knew "whether those experts would have made a difference in the ruling rendered" in the EEOC case, Higa responded: "Again, I don't know. Speculating. I can't -- I can't guess. All I know -- all I know is I never had the opportunity to defend my position or my reputation, all that stuff. Again, it was clearly targeted toward me."

Additionally, at the April 9, 2014 hearing on the County Defendants' motion for summary judgment, the Higas' attorney told the circuit court several times that the Higas could not show that the outcome of the EEOC litigation would have been different if not for the County Defendants' acts and that they do not know if Higa would have won the Mayor's race. During the course of the hearing, the Higas' counsel stated:

We can't say that the decision before the EEOC judge would be any different, and we can't -- nobody can. If I could do that I'd be in Vegas.

.

We are not saying that he would have won the election. We are not saying necessarily that the EEO [sic] decision would have come out differently. We don't know.

.

So what we're saying is basically we don't know about what they're saying. Okay.

"Would we have won?"

"I don't know."

"Would you have won the mayoral race?"

"I don't know."

In short, based on the evidence and the admissions before the circuit court, we conclude the circuit court properly determined that the County Defendants had negated the causation element of Higa's legal malpractice claims.⁴

Similar to Thomas, therefore, we conclude that summary judgment was warranted on the legal malpractice claims.⁵

B. Loss of Consortium

In light of our conclusion regarding the Higas' claims in Count I-III, we need not address the Higas' derivative loss of consortium claim in Count IV. Brown v. KFC Nat'l Mgmt. Co., 82 Hawai'i 226, 241, 921 P.2d 146, 161 (1996) (holding that loss of consortium is a derivative action, and that such claims are barred when the victim's initial claim of injury cannot be maintained) (citing Towse v. State, 64 Haw. 624, 637, 647 P.2d 696, 705 (1982)).

II. County Defendants' Cross-Appeal

In their cross-appeal, the County Defendants argue that the circuit court erred in denying their request for attorneys'

⁴ We note that the Higas generally argue that Chang's discrimination charge was time barred, but they provide no particulars to counter the evidence and admissions that Higa cannot show causation, i.e., that there would have been a different outcome in the EEOC case if not for the alleged negligent acts/omissions of Corporation Counsel. We further note that, although the Higas focus on Chang's assertion in her charge that the last incident involving Higa occurred on December 15, 2005, the charge as a whole encompasses allegations of discriminatory conduct by County employees up to early July 2006. Thus, the evidence in the record shows that Chang's charge dated November 6, 2006, which was submitted to the Hawaii Civil Rights Commission and dual filed with the EEOC, was timely.

As to Higa's contention that Ashida made derogatory public statements after the EEOC decision, and that Higa was not allowed to access files, Higa's alleged harm was the effect on the Mayor's race. Again, however, Higa admitted that he could not show any causation with regard to the Mayor's race. Further, the Higas do not allege any defamation claim.

⁵ Although the Higas raised an HRCF Rule 56(f) argument in the circuit court, they do not challenge the circuit court's ruling in that regard in this appeal.

fees under HRS § 607-14. We review the circuit court's ruling on the request for attorneys' fees for abuse of discretion. Hart v. Ticor Title Ins. Co., 126 Hawai'i 448, 455, 272 P.3d 1215, 1222 (2012).

The Hawai'i Supreme Court has held that assumpsit is "a common law form of action which allows for the recovery of damages for non-performance of a contract, either express or implied, written or verbal, as well as quasi contractual obligations." Blair v. Ing, 96 Hawai'i 327, 332, 31 P.3d 184, 189 (2001) (emphasis added) (quoting TSA Int'l Ltd. v. Shimizu Corp., 92 Hawai'i 243, 264, 990 P.2d 713, 734 (1999)). In deciding whether to award fees under HRS § 607-14, the court must determine the nature of the lawsuit where both assumpsit and non-assumpsit claims are asserted in an action. Id.

The Blair court analyzed whether a claim is in the nature of assumpsit using the following framework:

In ascertaining the nature of the proceeding on appeal, this court has looked to the essential character of the underlying action in the trial court. The character of the action should be determined from the facts and issues raised in the complaint, the nature of the entire grievance, and the relief sought. Where there is doubt as to whether an action is in assumpsit or in tort, there is a presumption that the suit is in assumpsit.

Id. (internal brackets, citations, and quotation marks omitted).

We first note that Higa's claim of an attorney-client relationship with Corporation Counsel is based on the Corporation Counsel's obligations under the Hawai'i County Charter, and is not based on an alleged contract. Second, based on our review of the Higas' verified complaint, we agree with the circuit court that it sounds in tort rather than contract. Indeed, even though Count II is labeled as asserting a breach of contract, given the actual allegations in that count, we have treated it as a professional negligence/legal malpractice cause of action.

In sum, the circuit court did not abuse its discretion in denying the County Defendants' motion for attorneys' fees.

III. Conclusion

Based on the above, we affirm the following entered by the Circuit Court of the Third Circuit:

(1) the "Order Granting Defendants County of Hawai'i and Lincoln Ashida, as the Corporation Counsel for the County of Hawai'i's Motion for Summary Judgment," filed on May 15, 2014;

(2) the "Order Denying Defendants County of Hawai'i and Lincoln Ashida's, as the Corporation Counsel for the County of Hawai'i, Motion for Award of Attorneys' Fees and Costs," filed on October 20, 2014; and

(3) the Judgment filed on November 24, 2014.

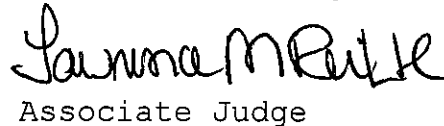
DATED: Honolulu, Hawai'i, March 9, 2018.

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Acting Chief Judge


Associate Judge


Associate Judge