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SCPW-23-0000086

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

ELEANOR P. FERNANDES,
Petitioner,

vs.

THE HONORABLE PETER K. KUBOTA,
Judge of the Circuit Court of the Third Circuit,
State of Hawai'i, Respondent Judge,

and

JAMES B. NUTTER & COMPANY, Respondent.

ORIGINAL PROCEEDING
(CIV. NO. 3CC161000329)

ORDER DENYING PETITION FOR WRIT OF MANDAMUS
(By: Recktenwald, C.J., McKenna, and Eddins, JJ.,
Circuit Judge To'oto'o and Circuit Judge Crabtree,
assigned by reason of vacancies)

Upon consideration of the petition for a writ of mandamus, filed on February 22, 2023 (Petition), the documents attached and submitted in support, and the record, Petitioner Eleanor P. Fernandes failed to establish a "clear and indisputable right to the relief requested and a lack of other means to redress adequately the alleged wrong or to obtain the requested action."

See Kema v. Gaddis, 91 Hawai‘i 200, 204, 982 P.2d 334, 338 (1999).

In the Petition, Petitioner challenged the circuit court’s decision to uphold a claim of attorney-client privilege, the circuit court’s subsequent refusal to reconsider this decision, and the Respondent Judge’s refusal to recuse.

Here, Petitioner is a party to the underlying foreclosure and by timely appeal may raise these grievances. See Hawai‘i Revised Statutes § 667-51(a)(1); Bank of Am., N.A. v. Reyes-Toledo, 139 Hawai‘i 361, 372, 390 P.3d 1248, 1259 (2017); see also Anastasi v. Fid. Nat. Title Ins. Co., 137 Hawai‘i 104, 106, 366 P.3d 160, 162 (2016) (reviewing an order that upheld the attorney-client privilege); Cho v. State, 115 Hawai‘i 373, 384-386, 168 P.3d 17, 28-30 (2007) (reviewing order on motion for reconsideration); Jou v. Dai-Tokyo Royal State Ins. Co., 116 Hawai‘i 159, 165, 172 P.3d 471, 477 (2007) (reviewing an order related to recusal). We find that mandamus to address these grievances is not warranted because “[s]uch writs are not meant to supersede the legal discretionary authority of the lower court, nor are they meant to serve as legal remedies in lieu of normal appellate procedures.” Kema, 91 Hawai‘i at 204, 982 P.2d at 338.

We turn now to the Petitioner's contention that the Respondent Judge has failed to rule on a motion for reconsideration of a discovery order that upheld, in part, the claim of attorney-client privilege. We are not persuaded that the circumstances raised in the Petition established that the circuit court "committed a flagrant and manifest abuse of discretion, or has refused to act on a subject properly before the court under circumstances in which it has a legal duty to act." Id. at 205, 982 P.2d at 339.

"Generally, in the absence of an extreme, compelling situation, a trial court that has jurisdiction over an action lacks authority to refuse to consider a litigant's motions." 56 Am. Jur. 2d Motions, Rules, and Orders § 38 (2023); see also In re Sch. Asbestos Litig., 977 F.2d 764, 793-795 (3d Cir. 1992) (discussing when a federal district court may refuse to consider a motion for summary judgment). But counterposed is the "general proposition, [that] a party is prohibited from filing repetitive motions for the same relief, or asserting the same basis[.]" 56 Am. Jur. 2d Motions, Rules, and Orders § 5 (2023) (footnote omitted).

Here, the circuit court did address and resolve, by order, the discovery dispute between the parties. In response to a motion to compel, the circuit court reviewed records in camera that the party withheld under a claim of attorney-client

privilege, and entered an order that upheld the privilege, in part. Petitioner was not satisfied with the circuit court's decision to uphold the privilege and filed multiple successive motions which, in substance, moved the circuit court to reconsider its prior decision on discovery.

Next, the circuit court addressed and resolved Petitioner's first motion for reconsideration, styled a "motion to clarify," and then later resolved Petitioner's "third motion to compel" that sought similar relief. Both of these motions filed by Petitioner had sought, in substance, reconsideration of the circuit court's decision to uphold the privilege. While the circuit court entered at least two orders denying the requested relief, the Respondent Judge failed to enter an order disposing of Petitioner's non-hearing motion filed on April 13, 2020 (Subject Motion). In the Subject Motion, the Petitioner again sought reconsideration of the circuit court's decision to uphold the privilege. Yet because the decision to consider the Subject Motion, which was a repeat motion for reconsideration of a discovery order, was committed to the discretion of the circuit court, it cannot be said that Petitioner's right to have the Respondent Judge resolve the Subject Motion is "clear and indisputable." See Kema, 91 Hawai'i at 204, 982 P.2d at 338.

The Petition made several other requests for relief, none of which we find warrant further review by mandamus. In sum,

none of the arguments made by Petitioner support the issuance of the requested writ. In so holding, we do not decide any question as to the merits.

The burden was on Petitioner to establish the extraordinary circumstances to warrant mandamus. We find that Petitioner failed to carry this burden. See Hawai'i Rules of Appellate Procedure, Rule 21(c) ("If the court is of the opinion that the writ should not be entertained, it shall deny the petition."). Petitioner's grievances may be pursued by appeal, rather than by resort to this court's original jurisdiction for extraordinary writs.

It is hereby ordered that the Petition is denied.

DATED: Honolulu, Hawai'i, July 21, 2023.

/s/ Mark E. Recktenwald

/s/ Sabrina S. McKenna

/s/ Todd W. Eddins

/s/ Fa'auuga L. To'oto'o

/s/ Jeffrey P. Crabtree

