

NOT FOR PUBLICATION

NO. 24955

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAI'I

ALOHA COUNCIL, BOY SCOUTS OF AMERICA, a Hawai'i Eleemosynary corporation, GARY O. GALIHER, and DIANE T. ONO, Plaintiffs-Appellees, v. ROSEMOND KEANUENUE NALUAI PETTIGREW, Defendant-Appellant, and FRANCES K.J. PETTIGREW, KYLE K. PETTIGREW and PATRICK K. PETTIGREW, MARION NAMAHAHA PETTIGREW BISHOP, JOHN R. TORRES, HEIRS AND ASSIGNS OF KAHAOLE; et al., Defendants

APPEAL FROM THE CIRCUIT COURT OF THE SECOND CIRCUIT
(CIV. NO. 92-0653(2))

MEMORANDUM OPINION

(By: Burns, C.J., Foley, J., and Circuit Judge Alm,
in place of Watanabe, J., recused)

Defendant-Appellant Rosemond Pettigrew (Pettigrew)

appeals from the following judgments entered in the Circuit Court of the Second Circuit¹ (the circuit court): (1) the March 31, 1995 summary judgment awarding Plaintiffs-Appellees Gary O. Galiher (Galiher) and Diane T. Ono (Ono) fee simple title to a 92.68-acre parcel of land (Parcel D) located within the ahupua'a² of Ahaino on Moloka'i; and (2) the June 17, 2002 Amended Final Judgment and Decree (June 17, 2002 Amended Judgment) deciding who has what rights to the land included within Grant 1129.

¹ The Honorable Shackley F. Raffetto presiding.

² An "ahupua'a" is a "[l]and division usually extending from the uplands to the sea[.]" Mary Kawena Pukui & Samuel H. Elbert, Hawaiian Dictionary 9 (rev. ed. 1986).

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On appeal, Pettigrew contends that the circuit court erred and abused its discretion when it: (1) awarded summary judgment to Galiher and Ono after (a) relying on "a map that was not identified, received into evidence, testified to and/or otherwise made a part of the record[,]" (b) disregarding "evidence of genuine issues and material facts introduced in this case[,]" and (c) "relying upon the void judgment in Civil No. 400(2)"; (2) awarded judgment in favor of the State of Hawai'i (the State) on its claims to mineral, metallic, and water rights and rights of native tenants pertaining to the land included within Grant 1129; and (3) did not require personal service and notice to the "Kukahi heirs". We affirm.

I. BACKGROUND

On June 7, 1848, Mahele Award 10 of an Ahupua'a of Moloka'i land was made to Hanakaipo and Hawai'i's government. In 1961, this Ahupua'a of Ahaino 1st was subdivided into parcels A (Nahiolo Fish Pond), B (0.27 acre oceanfront), C (0.340 acre oceanfront), D (92.68 acres), and E (163.97). Land Commission Award (LCA) no. 4891 to Kupihea (Royal Patent no. 4829), LCA no. 4122 to Kahaule (Royal Patent No. 3497), and LCA no. 3911 to Naone (Royal Patent No. 3496) are all within parcel E.

The subdivision map states that Parcel D is:

Gross Area	110.44 Acs.
Less Grant 1129, Apanas 1 and 2 to Kahaole	<u>17.76 "</u>
NET AREA	92.68 Acs.

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On September 23, 1992, Aloha Council, Boy Scouts of America (Aloha Council) filed in the circuit court its "Complaint to Quiet Title" (Civil No. 92-0653) to

[a]ll of that certain parcel of land (being all of the land(s) described in and covered by Royal Patent Grant 1129, Apanas 1 and 2 to Kahaole) situate, lying and being at Kaluaaha, Ahaino, Waialua, Island of Molokai, County of Maui, State of Hawaii, bearing Tax Key designation 5-7-005-011 (2), area 4.280 acres and 5-7-005-012 (2), area 13.480 acres, more or less[.]

Several defendants, including the State and Pettigrew, filed answers asserting their interests in the parcels of land described in the Complaint filed by Aloha Council. The State claimed the following interest: "The State reserves and owns all of minerals [sic] and metallic mines of every description . . . [t]he rights of native tenants are reserved . . . [t]he State reserves all right, title, interest, or claim to waters having their source upon or flowing over or under the parcel . . . [t]he State reserves an easement for the free flowage of waters over and across Uluwini Stream[.]"

On February 28, 1994, Aloha Council filed its First Amended Complaint to Quiet Title to (a) Grant 1129, Apanas 1 and 2, and (b) to

a portion of Mahele Award 10 to Hanakaipo, located at Ahaino, Molokai, Hawaii, containing a total area of 92.68 acres, and being all of Tax Map Key 5-7-05-10, Second Taxation Division, . . . , which property was conveyed by [Aloha Council] to Gary O. Galiher and Diane T. Ono by Deed dated October 23, 1992, recorded as Document [sic] No. 92-177058.

On June 17, 1994, Aloha Council, Galiher, and Ono filed Plaintiff's Motion for Summary Judgment regarding Parcel D (92.68

acres). Attached to the motion was an affidavit of Joanna Kaalele, vice-president of Title Guaranty of Hawaii, which detailed the chain of title from Hanakaipo, who received an undivided one-half ($\frac{1}{2}$) interest in Mahele Award 10 in 1848, to Galiher and Ono, who purchased Parcel D in 1992.

Pettigrew responded with "Defendant[']s Memorandum in Opposition to Plaintiffs['] Motion for Summary Judgment Filed 94 June 17", asserting that "the Naluai Estate" possessed "the only true title to the Ahupua'a of Ahaino."

On March 31, 1995, the circuit court entered a summary judgment (March 31, 1995 Summary Judgment) in favor of Galiher and Ono decreeing, in relevant part: "[Galiher and Ono] have a good and complete chain of title to a portion of Mahele Award 10 issued to Hanakaipo, located at Ahaino, Molokai, Hawaii, containing 92.68 acres . . . and fee simple title to the said real property is in [Galiher and Ono], free and clear of all claims, liens, encumbrances and clouds of any kind in said title[.]"

On November 24, 2000, a stipulation between the Aloha Council and the State, approved and ordered by the court, was filed. It stated, in relevant part, as follows:

- a. The State reserves and owns all minerals and metallic mines of every description;
- b. The rights of native tenants are reserved;
- c. The State reserves all right, title, interest, or claim to waters having their source upon or flowing over or under the

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parcel;

d. The State reserves an easement for the free flowage of waters over and across Uluwini Stream;

e. The Exhibit A description will be revised so that Course 16, 1460 00', is changed to 1460 30' and Course 25, 320.00 feet is changed to 330.00 feet; and

f. The Final Judgment will contain these reservations and that final judgment will be submitted to the Office of the Attorney General for approval, before the same is submitted to the Court for filing.

The Exhibit A description was of "a gross area of 110.44 acres and a net area of 92.68 acres, after excluding therefrom 17.76 acres for Grant 1129, Apanas 1 and 2 to Kahaole." The 92.68-acre parcel is Parcel D.

The claims to the land covered by Grant 1129 subsequently went to trial. During trial, on August 28, 2001, the parties reached a settlement agreement (August 28, 2001 Settlement Agreement), which was stated on the record. However, the relevant transcript is not a part of the record on appeal.

Pettigrew's December 20, 2001 letter to counsel for Aloha Council states, in relevant part, as follows:

On December 19, 2001, I received the Grant 1129 Settlement Agreement Between the Remaining Parties Placed on the Record on August 28, 2001, . . . and the Final Judgment and Decree

I reviewed both documents and can find only one reason to object, and that is to the exception of the State of Hawaii having any claim in and to the property. I fail to see why an exception is being made for the State. If the State has or had any claim to the property, then this information should have been made available to the parties. At no time, nor in any way, was I informed of the State having any claim(s). Therefore, I must object to the exception of the State being included in the Final Judgment and Decree.

. . . With the appeal of the lower Courts denial on the motion to set aside the judgment in Civil No. 400 before the appellate courts, it is illogical for the parties to resubdivide

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while the matters in Civil No. 400 are pending review.

On February 1, 2002, the following documents were filed: (1) The August 28, 2001 Settlement Agreement, which was approved and so ordered by the court; and (2) a Final Judgment and Decree.

The June 17, 2002 Amended Judgment states, in relevant part, as follows:

This case, having gone to jury waived trial; and after four days of trial the case having been settled; and the settlement agreement having been put orally on the record; and a written Settlement Agreement having been filed; and all issues in the case among all parties having been completely and finally resolved; it is therefore appropriate that this Amended Final Judgment and Decree be entered;

NOW THEREFORE, it is hereby Ordered, Adjudged and Decreed as follows:

. . . .

3. . . . [T]itle to Apanas 1 and 2 of this Grant 1129 to Kahaole, is owned by the Aloha Council, Boy Scouts of America, and by the Defendants Rosemond Pettigrew and Mililani Hanapai, and Apanas 1 and 2 are divided between the [Aloha Council], and [Rosemond Pettigrew and Mililani Hanapai] as stated below.

4. ROSEMOND PETTIGREW is the owner of a portion of Grant 1129, containing a total area of 4.28 acres, located within the red colored area shown on the map which is Plaintiffs' Exhibit 14, in fee simple absolute, free and clear of all claims, clouds, liens and encumbrances, except for the claims of the State of Hawaii.

5. MILILANI HANAPI is the owner of a portion of Grant 1129, containing a total area of 8.00 acres, located within the green colored area shown on the map which is Plaintiffs' Exhibit 14, in fee simple absolute, free and clear of all claims, clouds, liens and encumbrances, except for the claims of the State of Hawaii.

6. [Aloha Council] is the owner of the balance of Grant 1129, containing a total area of 5.48 acres, in fee simple absolute, free and clear of all claims, clouds, liens and encumbrances, except for the claims of the State of Hawaii, which will be consolidated into Tax Key 5-7-05-1.

7. Grant 1129:1 Tax Key 5-7-05-11, Grant 1129:2 Tax Key

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5-7-05-12, and Mahele Award 10 Tax Key 5-7-05-10³ will be consolidated into one lot and re-subdivided into the three lots mentioned in paragraphs 4, 5 and 6 above.

8. Access for all purposes including but not limited to vehicular and utility purposes to and from the nearest government road, namely the Kamehameha V Highway, and the parcels awarded to Rosemond K. Pettigrew and Louise Mililani Naluai Hanapi in paragraphs 4 and 5 above is hereby awarded as an easement over and across Parcels D and/or E as shown on Plaintiffs' Exhibit 14. The two parcels mentioned in paragraphs 4 and 5 above are the dominant tenements and the benefitted parcels, and Parcel D and/or E are the servient tenements and the burdened parcels. The easement(s) shall be the minimum, reasonable and least expensive route or routes selected. The easement(s) shall not be located in Ahaino 2 and shall not be located on or along existing roads of GARY GALIHER or DIANE ONO within Ahaino 1.

. . . .

15. PETTIGREW is free to pursue her litigation in Civil No. 400, and the Settlement Agreement in this case, the consolidation and re-subdivision, . . . and all . . . documents generated through the settlement, and this Judgement, shall not be used as evidence by any party in Civil 400.

. . . .

18. PETTIGREW and HANAPI may appeal the Summary Judgment awarding title to Mahele Award 10⁴ to GALIHER and ONO.

19. Judgment is hereby entered on the claim to Mahele Award 10 in favor of Plaintiffs Gary Galiher and Diane Ono and against Defendants Louise Hanapi, Rosemond Pettigrew, Mary Kauhala and all other Defendants who claimed an interest in Mahele Award 10.⁵

20. Galiher and Ono are hereby adjudged to be the owners of Mahele Award 10,⁶ subject to the rights of native tenants and the State of Hawaii's claims to mineral and metallic mines.

21. This Court hereby enters Judgment on the claim to Grant 1129 in favor of Plaintiff Aloha Council, Boy Scouts of America, Defendant Rosemond Pettigrew and Defendant Mililani Hanapi and against Defendants Francis Pettigrew, Kyle Pettigrew, Patrick Pettigrew, Marion Bishop, John Torres, Charles Pila and all other

³ This wording erroneously implies that Parcel D is all of Mahele Award 10.

⁴ This wording erroneously implies that Parcel D is all of Mahele Award 10.

⁵ This wording erroneously implies that Parcel D is all of Mahele Award 10.

⁶ This wording erroneously implies that Parcel D is all of Mahele Award 10.

Defendants who claimed an interest in Grant 1129.

22. The Court hereby enters Judgment on the claim to Grant 1129 in favor of the State of Hawaii in accordance with the November 24, 2000, Stipulation regarding the State's claims of mineral, metallic and water rights and rights of native tenants.

II. STANDARDS OF REVIEW

A. Summary Judgment

We review a circuit court's grant or denial of summary judgment de novo under the same standard applied by the circuit court. Hawaii Cmty. Fed. Credit Union v. Keka, 94 Hawai'i 213, 221, 11 P.3d 1, 9 (2000); Roxas v. Marcos, 89 Hawai'i 91, 116, 969 P.2d 1209, 1234 (1998). As the Hawai'i Supreme Court has often articulated, "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 a judgment as a matter of law." Keka, 94 Hawai'i at 221 (citations and internal quotation marks omitted). This court recognizes that "[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." Hulsman v. Hemmeter Dev. Corp., 65 Haw. 58, 61, 647 P.2d 713, 716 (1982) (citations omitted).

When performing this review, "[w]e . . . view all of the evidence and the inferences drawn therefrom in the light most

favorable to the party opposing the motion." Morinoue v. Roy, 86 Hawai'i 76, 80, 947 P.2d 944, 948 (1997) (brackets omitted) (quoting Maguire v. Hilton Hotels Corp., 79 Hawai'i 110, 112, 899 P.2d 393, 395 (1995)).

Hawai'i Rules of Civil Procedure Rule 56(e) (2004)

specifies, in relevant part, that

[w]hen a motion for summary judgment is made . . . an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

Thus, a party opposing a motion for summary judgment cannot discharge his or her burden by alleging conclusions, nor can the hope of producing the required evidence entitle the party to trial. Henderson v. Prof'l Coatings Corp., 72 Haw. 387, 401, 819 P.2d 84, 92 (1991) (quoting 10A C. Wright, A. Miller & M. Kane, Federal Practice and Procedure: Civil § 2727 (2d ed. 1983)); see Fujimoto v. Au, 95 Hawai'i 116, 136-37, 19 P.3d 699, 719-20 (2001).

B. Interpretation of a Consent Decree

"A judgment or decree entered by consent of the parties is in the nature of a contract, approved by the court, and cannot be set aside except on grounds adequate to justify the rescission of a contract." Dowsett v. Cashman, 2 Haw. App. 77, 83, 625 P.2d 1064, 1068 (1981). Similar to the interpretation of a contract, "the interpretation of a consent decree is reviewed de novo." 46

Am. Jur. 2d Judgment § 220 (1994).

III. DISCUSSION

A. March 31, 1995 Summary Judgment

Pettigrew's primary argument is that the circuit court erred in entering the March 31, 1995 Summary Judgment in favor of Aloha Council. Specifically, Pettigrew contends that the circuit court erroneously (1) relied on a map that was not identified, received into evidence, testified to or made part of the record; (2) relied on the January 23, 1963 judgment in Civil No. 400; (3) did not require service of process on the heirs of Kukahi; and (4) disregarded genuine issues of material fact. It is unnecessary to address each argument individually because all of Pettigrew's arguments for vacating the March 31, 1995 have been decided in this court's recent opinion in the companion case State v. Heirs of Kukahi, No. 24353, which was Pettigrew's appeal of Civil No. 400.

Civil No. 400 was a partition action that resulted in a 1963 Decree Determining Title and Ordering Partitioning deciding that:

1. The State of Hawai'i "is the owner in fee simple of an undivided one-half ($\frac{1}{2}$) interest in and to" Parcels C, D, and E.

2. Robert and Elsie Ching (the Chings) "are the owners in fee simple of the other and remaining undivided one-half ($\frac{1}{2}$)

interest in and to [Parcels C, D, and E], as tenants by the entirety".

3. The State shall convey to the Chings title to Parcels C and D, the Chings shall convey to the State title to Parcel E, and the State shall "convey and set aside a non-exclusive perpetual right of way not less than 30 feet in width, in favor of said Parcel D to provide the same with access to and from a Government Road, through, over and across such portion of said Parcel E as [the State and the Chings] shall mutually determine and agree." The Chings later sold their interest in Parcel D to Aloha Council, who in turn conveyed their interest in Parcel D to Galiher and Ono.

In 1995, Pettigrew sought to have the 1963 Decree Determining Title and Ordering Partitioning set aside. When she lost, she appealed. In State v. Heirs of Kukahi, appeal no. 24353, this court decided that (1) the 1963 judgment decreeing title in Civil No. 400 was not void on either jurisdictional or due process grounds; and (2) because the 1963 judgment in Civil No. 400 was valid, the Chings became absolute owners of Parcel D based upon the expiration of the statutory time limit for challenging the validity of the judgment. This court's decision in State v. Heirs of Kukahi, No. 24353, negates all of Pettigrew's claims of ownership of Parcel D. Thus, her present arguments challenging the circuit court's grant of summary

judgment are res judicata.

Even if we were to conclude that Pettigrew's arguments in favor of vacating the March 31, 1995 Summary Judgment were not res judicata, Pettigrew's challenge would nonetheless fail. First, nothing in the record indicates that the circuit court relied upon an inadmissible map in reaching its decision on the summary judgment. In support of her claim, Pettigrew refers to the transcript from the February 22, 1995 hearing on the motion for summary judgment. This transcript, however, is not a part of the record on appeal. The "map which is Plaintiffs' Exhibit 14" referred to in order no. "5" in the June 17, 2002 Amended Final Judgment and Decree is "Tax Map Key 5-7-05-10, Second Taxation Division".

Second, nothing in the record indicates that the circuit court based its decision to grant summary judgment on the judgment in Civil No. 400. Moreover, contrary to the requirement stated in Hawai'i Rules of Appellate Procedure (HRAP) Rule 28(b)(4) (2004), Pettigrew has not stated where in the record an objection was made to the alleged error. HRAP Rule 28(b)(4) (2004) specifies that "[p]oints not presented in accordance with this section will be disregarded[.]"

Third, Pettigrew does not specify where in the record an objection was made to the alleged fact that the court did not require Aloha Council "to serve process and give notice to Kukahi

heirs." Moreover, Pettigrew does not have standing to complain of this alleged error. "[O]ne does not have standing to assert a violation of rights belonging to another, since the person entitled to a right is the only one who can be *directly* injured by its deprivation." Akinaka v. Disciplinary Bd. of the Hawai'i Supreme Court, 91 Hawai'i 51, 58, 979 P.2d 1077, 1084 (1999) (citation omitted, emphasis in original). Nothing in the record indicates that Rosemond Pettigrew is a Kukahi heir.

Fourth, Pettigrew argues that the circuit court erred in granting summary judgment because "it disregarded evidence of genuine issues and material facts." Pettigrew states that she has "legally cognizable" title to lands in Ahaino, specifically LCA no. 4891, thus creating a genuine issue as to title. However, Pettigrew presented no evidence showing that any part of LCA no. 4891 was within Parcel D. In fact, Pettigrew was unable to demonstrate that she had any interest in Parcel D at all. On the other hand, Aloha Council, Galiher, and Ono were able to establish title to Parcel D through expert witness Joanna Kaalele, vice president of Title Guaranty of Hawaii, who detailed the chain from Hanakaipo, who received an undivided one-half (½) interest in Mahele Award 10 in 1848, to Galiher and Ono, who purchased Parcel D in 1992. Thus Pettigrew failed to establish any title, much less title superior to that of the Chings, Aloha Council or Galiher and Ono. Harrison v. Davis, 22 Haw. 465, 466

(1915).

B. Amended Final Judgment

Pettigrew argues that the circuit court erred when it awarded title to the Grant 1129 land "except for the claims of the State of Hawaii" regarding all minerals and metallic mines of every description", "[t]he rights of native tenants", all "waters having their source upon or flowing over or under the parcel", and "an easement for the free flowage of waters over and across Uluwini Stream[.]" Pettigrew challenges the reservation in favor of the State because (1) she was not made a party to a stipulation between the State and Aloha Council, and (2) she did not agree to this exception in the August 28, 2001 Settlement Agreement.

The only relevant consequence of the fact that Pettigrew was not a party to the stipulation between the State and Aloha Council is that the stipulation is not binding on her.

In her opening brief, Pettigrew asserts that "[Pettigrew] was not aware at any time of the [S]tate's claims or future claims in Grant 1129 during the settlement negotiations on August 28, 2001, nor did [Pettigrew] agree to the [S]tate's exception on the record in the settlement." We conclude that Pettigrew's alleged ignorance is not a defense. The State's claims were clearly expressed in its December 4, 1992 answer to the complaint and Pettigrew either knew or should have known of

those claims.

The question is whether Pettigrew agreed to the reservation in favor of the State when she agreed to the August 28, 2001 Settlement Agreement stated on the record. It is Pettigrew's burden to show that she did not. Pettigrew failed her burden because she did not cause a transcript of the August 28, 2001 hearing to be made a part of the record on appeal. Pettigrew's December 20, 2001 letter makes it clear that she did not agree to the reservation in favor of the State noted in the written settlement agreement. Nothing, however, shows that she did not orally agree to the August 28, 2001 Settlement Agreement or that the August 28, 2001 Settlement Agreement did not contain a reservation in favor of the State.

CONCLUSION

Accordingly, we affirm (a) the March 31, 1995 Summary Judgment and (b) the June 17, 2002 Amended Final Judgment and Decree.

DATED: Honolulu, Hawai'i, April 23, 2004.

On the briefs:

Rosemond K. N. Pettigrew,
pro se Defendant-Appellant. Chief Judge

Tom C. Leuteneker
(Carlsmith Ball LLP) Associate Judge
for Plaintiffs-Appellees.

Associate Judge