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NO. 25859

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

NICHOLAS J. OCHS, D.M.D., Plaintiff-Appellant, v. HAWAII MEDICAL SERVICE ASSOCIATION, a Hawaii non-profit corporation; 8510 DENTAL MANAGEMENT fka HAWAII FAMILY DENTAL CENTER, a Hawaii non-profit corporation; INTEGRATED SERVICES INCORPORATED, dba DENTAL SERVICES MANAGEMENT, Defendants-Appellees, and JOHN DOES 1-10; DOE PARTNERSHIPS 1-10; DOE CORPORATIONS 1-10; and DOE ENTITIES 1-10, Defendants

APPEAL FROM THE CIRCUIT COURT OF THE SECOND CIRCUIT
(CIVIL NO. 01-1-0459(3))

SUMMARY DISPOSITION ORDER

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

Plaintiff-Appellant Nicholas Ochs (Appellant) appeals from the Circuit Court of the Second Circuit's April 30, 2003 final judgment awarding summary judgment in favor of Defendants-Appellees Hawaii Medical Services Association (HMSA), Dental Management f.k.a. Hawaii Family Dental Center, and Integrated Services Incorporated d.b.a. Dental Services Management (Appellees) on Counts I-III alleging violations of Hawai'i's antitrust laws, Count IV alleging unfair competition in violation of Hawaii Revised Statutes (HRS) section 480-2 (1993), and Count V alleging tortious interference.¹ This appeal was assigned to this court on March 8, 2004. After a *de novo* review of the record,² we resolve Appellant's points of error as follows:

¹ The Honorable Joseph E. Cardoza presided.

² See Fujimoto v. Au, 95 Hawai'i 116, 19 P.3d 699 (2001).

NOT FOR PUBLICATION

Regarding Appellant's points of error one through five, challenging the court's ruling as to Counts I-III, we conclude that the court's ruling is correct. Appellant's antitrust claims do not survive summary judgment because he fails to show that a genuine issue of material fact exists as to harm to competition in the relevant market, a necessary element of proof to his antitrust claims. See Hawai'i Rules of Civil Procedure (HRCP), Rule 56(e); Fujimoto v. Au, 95 Hawai'i 116, 19 P.3d 699 (2001); Austin v. McNamara, 979 F.2d 728 (9th Cir. 1992); U.S. v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001); Robert's Hawaii Sch. Bus, Inc. v. Laupahoehoe Transp. Co., Inc., 91 Hawai'i 224, 982 P.2d 853 (1999).

Regarding Appellant's points of error six and seven, challenging the court's ruling as to Count IV, we conclude that the court's award of summary judgment is correct. Appellant lacks standing under HRS section 480-2 because HRS section 480-2(e) (2002), which provides competitors with a private right of action is substantive, not procedural, and shall not operate retroactively absent clear legislative expression to the contrary. See HRS § 1-3 (1993); Graham Constr. Supply, Inc. v. Schrader Constr., Inc., 63 Haw. 540, 632 P.2d 649 (1981); Clark v. Cassidy, 64 Haw. 74, 636 P.2d 1344 (1981); Wong v. Takeuchi, 88 Hawai'i 46, 961 P.2d 611 (1998).

Regarding Appellant's points of error eight and nine, challenging the court's ruling as to Count V, we conclude that the court's decision is correct. Appellant does not challenge on

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appeal the court's finding that he failed to proffer evidence that Appellees' alleged conduct caused any prospective patient to not enter into a contract with him. Consequently, Appellant is bound by this finding. See Taylor-Rice v. State, 91 Hawai'i 60, 979 P.2d 1086 (1999); Kawamata Farms, Inc. v. United Agri Products, 86 Hawai'i 214, 948 P.2d 1055 (1997). As a result, Appellant has not stated a claim for tortious interference. See Robert's Hawaii Sch. Bus, Inc. v. Laupahoehoe Transp. Co., Inc., 91 Hawai'i 224, 982 P.2d 853 (1999); Kutcher v. Zimmerman, 87 Hawai'i 394, 957 P.2d 1076 (App. 1998).

Therefore,


IT IS HEREBY ORDERED that the April 30, 2003 "Final Judgment in Favor of Defendants Hawaii Medical Service Association, 8510 Dental Management fka Hawaii Family Dental Center and Integrated Services Incorporated, dba Dental Services Management and Against Plaintiff Nicholas J. Ochs, D.M.D." is affirmed.

DATED: Honolulu, Hawai'i, September 9, 2005.

On the briefs:

Arleen D. Jouxson and
Rafael G. Del Castillo,
(Jouxson-Meyers & Del
Castillo)
for Plaintiff-Appellant.

Ellen Godbey Carson, and
Dianne Winter Brookins,
(Alston Hunt Floyd & Ing), and
Steven P. Means,
(Michael Best & Friedrich)
for Defendants-Appellees.


Acting Chief Judge


Associate Judge


Associate Judge