NO. 22939

IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

MITCHELL A. KITAY, Plaintiff-Appellee,

vs.

PANTHEON COMPANY, LIMITED, Defendant-Appellant.

APPEAL FROM THE FIRST CIRCUIT COURT
(CIV. NO. 98-4104-09)

MEMORANDUM OPINION
(By: Moon, C.J., Levinson, Nakayama, and Ramil, JJ.,
and Acoba, J., Dissenting)

Defendant-appellant Pantheon Company, Limited (Pantheon) appeals from the final judgment of the first circuit court, the Honorable Gail C. Nakatani, presiding, entered on October 29, 1999 in favor of plaintiff-appellee Mitchell Kitay. Final judgment was entered pursuant to a grant of partial summary judgment, brought pursuant to Hawaiʻi Rules of Civil Procedure (HRCP) Rule 56 (1997), declaring Kitay as the lawful owner of a Pantheon Stock Certificate.[1]

For the reasons discussed below, we hold that, because genuine issues of material fact existed, the circuit court erred in granting Kitay's motion for partial summary judgment.

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[1] Final judgment was entered subsequent to the dismissal of all remaining claims by stipulation of the parties.

Accordingly, we vacate the final judgment and remand this case for further proceedings.

I. BACKGROUND

In 1994, Glenn G. White inherited the Pantheon Stock Certificate representing seventeen shares of Pantheon stock. In 1998, White decided to sell his stock certificate. He contacted John Rosenwald, with whom he had maintained a personal friendship over the course of two decades, and asked for assistance in locating an interested buyer. Rosenwald approached Kitay, a close personal friend, and advised him of White's interest in selling the Pantheon stock. With Rosenwald acting as an intermediary, White ultimately agreed to sell the stock certificate to Kitay.

Pursuant to Pantheon's by-laws,

> [n]o stockholder shall have the right or power to sell or otherwise dispose of their stock, except by will, without first offering said stock for sale to the company, at the actual price per share at which said stock is to be sold. Such offer shall be made by the stockholder in writing and shall remain open for acceptance by the company for a period of thirty (30) days from the date of delivery of such notice in order to enable the company to purchase it or place it with any of the other stockholders. If at the expiration of the thirty (30) days the offer shall not have been accepted, the stockholder wishing to sell shall have the right to sell such stock at the actual price per share at which said share or shares were offered to the company.

(Emphases added.) In compliance with Pantheon's by-laws, White informed Pantheon by letter, dated February 3, 1998, that he had received an offer to purchase his seventeen shares of stock at $5,000 per share, or $85,000. At the expiration of the thirty

days specified in the by-laws, Pantheon declined the offer to purchase White's shares at $5,000 per share. In its letter of March 30, 1998, Pantheon made a counter-offer to purchase the stock at book value and informed White that "the most recent sale of stock by a shareholder was made by the Pantheon Company at $3,000 a share." White did not respond to the counter-offer and proceeded to sell his stock to Kitay on the evening of March 30, 1998.

Pantheon received a letter from Kitay dated that same day essentially requesting that a new stock certificate, evincing transfer of White's seventeen shares of stock, be issued in Kitay's name as soon as possible. Included with the letter was a copy of White's certificate, endorsed by White to Kitay and witnessed by Kinichi Enomoto, a "close personal friend" of both men. Counsel for Pantheon responded by letter, dated May 6, 1998, attempting to ascertain compliance with Pantheon's by-laws. Pantheon requested that Kitay provide documentary evidence confirming the purchase price. In response, both Kitay and White informed Pantheon, in writing, that the purchase price was $85,000, which was paid via $68,000 in cash and a $17,000 check. Pantheon thereafter requested "a deposit slip, cancelled check or bank statement evidencing the $17,000.00 payment by check and the deposit of the $68,000.00 in cash." Pantheon also requested an

explanation as to why the parties chose to make the payment of such a significant amount of money in cash.

On September 9, 1998, Kitay, through his attorney, responded by demanding that Pantheon: (1) recognize him as the lawful owner of the stock certificate; (2) register the transfer; and (3) amend its books and records accordingly. Kitay also stated that Pantheon's failure to comply with his demand by September 16, 1998 would result in a lawsuit. On September 11, 1998, Pantheon responded that the restriction on transfer of stock was "a customary one in a closely held family corporation" and that, in light of its right of first refusal, Pantheon wanted independent evidence that the alleged $85,000 purchase price had been paid. Pantheon again requested documentary evidence of the purchase price.

On September 17, 1999, Kitay responded by filing a three-count complaint against Pantheon. In Count I, Kitay sought a declaratory judgment recognizing him as the lawful owner of the certificate; in Count II, Kitay alleged that Pantheon's refusal to recognize him as the shareholder constituted a breach of contract; and, in Count III, Kitay alleged that Pantheon's refusal to register the transfer of the certificate constituted a

violation of Hawai‘i Revised Statutes (HRS) § 490:8-401 (Supp. 1997).[2]

During discovery, Pantheon sought to obtain, inter alia, all cancelled checks, promissory notes, drafts, and money orders reflecting payment of any portion of the purchase price. Specifically, Pantheon requested: (1) statements for all accounts from which any portion of the cash used to purchase the certificate was obtained; (2) any documents evincing a receipt from any person, institution, or entity for any portion of the cash payment made to White; (3) any evidence of agreements or offers between Kitay and White regarding the sale of the certificate; (4) any offers between the parties; (5) documentation, notes, or appraisals by Kitay or others regarding the value of the certificate or of Pantheon's assets, liabilities, or equity; and (6) evidence of any debt owed by White to Kitay and any payments made thereon. On January 27, 1999, Kitay responded to the document request by providing Pantheon with (1) a copy of a bank statement indicating that a $17,000 check was processed from Kitay's account on April 1, 1998 and (2) a copy of a $17,000 check drawn from Kitay's account and

[2] HRS § 490:8-401(b) creates a duty on the part of security issuers to register transfers and provides that, where such a duty exists, "the issuer is liable to a person presenting a certificated security or an instruction for registration or to the person's principal for loss resulting from unreasonable delay in registration or failure or refusal to register the transfer."

made payable to White. The memo line on the $17,000 check bears the notations "@ 1000" and "17 Shares Pantheon Company, Limited." No other documents were produced.

In response to a series of interrogatories prepared by Pantheon, Kitay maintained that he paid $68,000 in cash because he had that amount of money available to him. Kitay did not specifically respond to the request that he identify any accounts or sources from which he directly obtained the cash, but merely noted that he had "accumulated the cash from various sources, including but not limited to the sale of collectibles, junkets to Las Vegas, and from [his] family's restaurant business in California." According to his answers to interrogatories, Kitay indicated that he had personally handed over the $68,000 in cash to White and that Rosenwald and Enomoto witnessed the transaction and were the only other individuals with personal knowledge of the cash payment made to White. Kitay explained that the notation on the memo line of the $17,000 check was intended "[t]o memorialize that part of the transaction." In response to an interrogatory asking Kitay to explain fully how he had "valued 17 shares of Pantheon stock to be worth a payment of $85,000[,]" Kitay claimed that he based his decision solely on the fact that Rosenwald told him that $5,000 per share "was a good price" and that he did not discuss the value of the certificate, Pantheon, or its stock with anyone other than Rosenwald and White.

Finally, Kitay maintained that White was not indebted to him "in anyway at any time."

Pantheon subpoenaed White and requested that he produce evidence similar to that requested of Kitay. In response, White produced statements from accounts he held with various banks, indicating, inter alia, the following deposits: (1) a check for $17,000 on March 31, 1998; (2) $8,000 cash on April 22, 1998; (3) another $8,000 cash and $5,000 cash on October 28, 1998; and (4) another $5,000 cash on April 9, 1999.

On June 14, 1999, Kitay filed a motion for partial summary judgment as to Count I (declaratory relief). Kitay's motion was supported by declarations prepared by Kitay, White, Rosenwald, and Enomoto. All four declarations attested to the $85,000 purchase price for the stock certificate with payment taking the form of a $17,000 check and $68,000 in cash and that the transaction had occurred on the evening of March 30, 1998 in Enomoto's office. Rosenwald and Enomoto both declared that they had witnessed the transaction and had assisted in counting the cash. White's declaration also asserted that he had spent approximately $12,000.00 of the original cash payment, still had in his possession approximately $30,000.00, and that the remaining amounts had been deposited in various accounts. As previously indicated, a total of $26,000.00 had been deposited by White into various accounts between April 1998 and April 1999.

Kitay's motion was also supported by White's bank statements and deposit slips, noted supra, as well as a bank statement evincing that $17,000 was withdrawn from Kitay's bank account on the same date that a like amount was deposited into White's account.

In its memorandum in opposition to Kitay's motion, Pantheon argued that a genuine issue of material fact existed as to whether $85,000 had actually been paid and that Kitay was not entitled to declaratory relief. Pantheon, relying on the documentary evidence submitted by Kitay in support of the motion, argued that:

> The documentation provided by Kitay and White appear to establish that a check for $17,000 was written by Kitay from an account in his name and made payable to White. However, the memo line on the check states: "@ 1000" and "17 Shares Pantheon Company, Limited." The check alone raises genuine issues of material fact as to whether or not the shares were purchased for $1,000 each, as indicated by the check, or for $5,000 each, as alleged by Kitay.

Pantheon also argued that White's deposit slips and bank statements failed to establish that White had received $68,000 in cash on March 30, 1998. Finally, Pantheon also questioned the credibility of the declarations supporting Kitay's motion for partial summary judgment, emphasizing the fact that they had been prepared by individuals who had longstanding, close personal friendships with the interested parties.

Following the July 6, 1999 hearing on the motion for partial summary judgment, the circuit court ruled that Kitay was entitled to judgment as a matter of law. The order granting

Kitay's motion for partial summary judgment was entered on July 23, 1999. Thereafter, Counts II and III of Kitay's complaint were dismissed by stipulation of the parties. Final Judgment was entered on October 29, 1999, and this timely appeal followed.

II. STANDARD OF REVIEW

"An order granting summary judgment is reviewed de novo, using the same standard as that applied by the trial court: whether there were any genuine issues of material facts and whether the movant was entitled to judgment as a matter of law." Keliipuleole v. Wilson, 85 Hawai'i 217, 220, 941 P.2d 300, 303 (1997).

Summary judgment should be granted only "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." HRCP Rule 56(c). When a motion for summary judgment is made and supported as required by HRCP Rule 56, the party opposing the motion will generally not be allowed to rest upon the mere allegations or denials of his or her pleading. HRCP Rule 56(e). "However, in situations where the moving party has failed to meet its burden, or its papers indicate that a genuine issue exists, the nonmoving party does not have to present affidavits or evidence countering the motion." GECC Financial Corp. v.

Jaffarian, 79 Hawai'i 516, 525, 904 P.2d 530, 539 (App. 1995) (Acoba, J., concurring), aff'd, 80 Haw. 118, 119, 905 P.2d 624, 625 (1995).

> The moving party's burden of proof is a stringent one, since the inferences to be drawn from the underlying facts alleged in the relevant materials considered by the court in deciding the motion must be viewed in the light most favorable to the non-moving party, and any doubt concerning the propriety of granting the motion should be resolved in favor of the non-moving party.

Pioneer Mill Co., Ltd. v. Dow, 90 Hawai'i 289, 296, 978 P.2d 727, 734 (1999) (internal citations and emphases omitted).

III. DISCUSSION

In light of the right of first refusal created by Pantheon's by-laws, Kitay would be entitled to summary judgment only if he proved that he had paid White nothing less than $5,000 per share for White's seventeen shares of Pantheon stock inasmuch as the $5,000 per share price was first offered to Pantheon, which it declined. Evidence to the contrary would, in this context, create a genuine issue of material fact. Consequently, the dispositive issue is whether Kitay has met his burden of establishing, as a matter of law, that he paid no less than $5,000 per share and thus is entitled, as a matter of law, to a declaratory judgment recognizing him as the lawful owner of the Pantheon stock certificate.

On appeal, Pantheon argues, inter alia, that the memo line on the $17,000 check, which contained the notations "@ 1000" and "17 Shares Pantheon Company, Limited," is "strong evidence

that Mr. Kitay paid only $1,000.00 per share for the seventeen shares of Pantheon stock, evidence sufficient to raise a factual issue for resolution at trial." We agree.

Kitay maintains that the memo line notations on the check were merely meant "to memorialize that portion of the transaction." To accept Kitay's position, as well as the position of the dissent,[3] however, is to ignore the plain language of the notation and the inference that could reasonably be drawn therefrom, i.e., that Kitay purchased the seventeen shares of stock at $1,000 per share for a total purchase price of $17,000.00. Because the proffered evidence was reasonably susceptible to conflicting interpretations, the grant of summary judgment was inappropriate. Fry v. Bennett, 59 Haw. 279, 280-81, 580 P.2d 844, 846 (1978).

Although we believe the memo line notation on the check alone, viewed in the light most favorable to the non-moving party, raises a genuine issue of material fact, other evidence presented at the hearing supports the conclusion that summary judgment was improper. For example, White attested under oath in

[3] The dissent maintains that: (1) "The declarations of White, Kitay, Rosenwald[,] and Enomoto are not in conflict or rebutted by any specific evidence to the contrary and are consistent with the notations on the check[]"; and (2) "Because Pantheon's understanding of the significance of the notations on Kitay's check amounts to speculation and is not supported by affidavits, the check notations cannot be understood to create a genuine issue of material fact." Dissenting op. at 10.

his affidavit that the total purchase price of his seventeen shares of Pantheon stock was $85,000 and that he received that amount. However, as Pantheon argued, the amount was not reported on his federal income tax return, which he filed under penalty of perjury. Although the circuit court believed that the nonreporting "may point to inappropriate and improper handling of [the $85,000] for business and tax purposes," an equally reasonable inference to be drawn from the nonreporting by White is that he simply did not receive this income. Thus, White's affidavit and his tax return could be construed to contradict each other.

Finally, although the declarations submitted in support of Kitay's motion for partial summary judgment support his version of the events, Pantheon argues that they are suspect because they were proffered by the parties in interest and witnesses whose credibility would be subject to attack at trial. Relying on Costa v. Able Distributors, Inc., 3 Haw. App. 486, 653 P.2d 101 (1982), Kitay maintains that "a party opposing [a] motion for summary judgment must be able to point to some facts which refute the proof of the movant in some material portion and not merely recite the incantation, 'Credibility,' and have a trial on the hope that a jury may disbelieve factually uncontested proof." Id. at 489, 653 P.2d at 104 (citation and some internal quotations marks omitted).

Indeed, in Critchfield v. Grand Wailea Co., 93 Hawai‘i 477, 6 P.3d 349, reconsideration denied, 93 Hawai‘i 477, 6 P.3d 349 (2000), published after the entry of final judgment in this case, we "reiterate[d] that mere suspicion that an affiant may be lying is not an appropriate basis upon which to grant or deny a motion for summary judgment." Id. at 488, 6 P.3d at 360 (citing Cordeiro v. Burns, 7 Haw. App. 463, 470, 776 P.2d 411, 416 (1989)) (internal quotation marks and ellipses points omitted). However, we also noted that,

> [a]lthough . . . the credibility of an affiant or deponent, standing alone, does not produce a genuine issue of material fact, the fact remains that, where the record evinces a conflict in the evidence regarding the content of an affidavit or deposition, then the issue of the affiant's or deponent's credibility involves more than a mere bald allegation that an affiant's or deponent's statements are self-serving fabrications, and, therefore, the credibility of the affiant or deponent must be assessed by the trier of fact.

Id. at 488, 6 P.3d at 360 (emphases added) (citations omitted). In the instant case, the "conflict in the evidence" contained in the record derives from the plain language of the memo line on the $17,000 check. Thus, the credibility of Kitay's assertion that the memo line notations merely reflect partial payment "must be assessed by the trier of fact." Id.

IV. CONCLUSION

Based on the foregoing, we hold that Kitay failed to meet his burden of proving that no genuine issues of material fact exist, entitling him to judgment as a matter of law.

Therefore, we vacate the final judgment and remand this case for further proceedings.

DATED: Honolulu, Hawai‘i, July 10, 2002.

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