

NO. 22832

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

KAILENE NIHIPALI, Petitioner-Appellee, v.
DUSTIN-JAMES LOPEZ, Respondent-Appellant

APPEAL FROM THE DISTRICT COURT OF THE FIRST CIRCUIT,
HONOLULU DIVISION
(CIV. NO. 1SS 99-289)

MEMORANDUM OPINION

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

Respondent-Appellant Dustin-James Lopez (Lopez) appeals from a post-judgment order denying his District Court Rules of Civil Procedure (DCRCP) Rule 60(b) Motion to Vacate Order Granting Petition for Injunction Against Harassment (60(b) motion). Lopez contends that the district court abused its discretion when it denied his 60(b) motion without holding an evidentiary hearing and/or because Lopez had refused to continue the hearing on the TRO petition pending disposition of his criminal case. We disagree with Lopez's contentions and affirm the district court's denial of his 60(b) motion.

I. BACKGROUND

On April 14, 1999, Petitioner-Appellee Kailene Nihipali (Nihipali) filed a Petition for Ex Parte Temporary Restraining Order and For Injunction Against Harassment pursuant to Hawaii Revised Statutes (HRS) § 604-10.5 (1993 & Supp. 1998) (TRO

petition). On May 5, 1999, the district court held a hearing on the TRO petition and entered an Order Granting Petition for Injunction Against Harassment, effective for three years. Lopez did not file an appeal of the order. On August 11, 1999, Lopez moved to vacate the May 5, 1999, order pursuant to DCRCP Rule 60(b), arguing that Nihipali committed fraud upon the court. The district court denied the 60(b) motion without a hearing. The district court, in its denial, noted: "Respondent had opportunity to continue the hearing until the criminal case was disposed of and declined to do so."

On April 14, 1999, Nihipali filed the TRO petition and made a police report claiming that on January 29, 1999, Lopez sexually assaulted her by placing his fist in her vagina while she was screaming and protesting. Nihipali claimed she went to Kapi'olani Hospital with extensive internal bleeding and pain. Nihipali claimed that between January 29, 1999, and April 14, 1999, Lopez "called, paged, looked for me in classes at U.H., looked for me at my eating and socializing places and told my friends that he was 'going to kill me.'" Nihipali described herself as "extremely frightened and scared for my life." Nihipali claimed that she was unable to attend her classes because of "his stalking and verbal threats."

A Temporary Restraining Order Against Harassment was issued on April 14, 1999. About a week later Lopez was indicted

in connection with the January 29, 1999, sexual assault incident alleged in Nihipali's TRO petition. A hearing on the TRO petition was held on May 5, 1999. Despite Lopez's objection that it was inadmissible hearsay, Nihipali was allowed to testify that her friends told her Lopez contacted these friends and other people she associated with and threatened to come after her and kill her. According to Nihipali, these friends claimed Lopez tried to find Nihipali and asked people where she was and how he could find her. Nihipali testified she received telephone threats at her residence that she was going to be killed and she better stay away or people would come after her. Nihipali testified that she had a few phone calls from "one girl and about two guys." Nihipali stated she believed Lopez was responsible for those threats because "[h]e has come up to where I hang out at school and my friends don't know who he is and he has asked for me up there and he'd been seen coming to my classes and looking for me and has told a couple of people that he's looking for me and said that he was going to come after me and kill me."

Nihipali stated that Lopez never personally or directly threatened her. The first telephone call Nihipali received came from a male voice she had never heard before; the male said she was "going to die if [she] keep lying." The second phone call came from a female who "mentioned his [Lopez's] name" and told Nihipali she "was lying and that [she] should stop" and "people

are going to come after [her] and [she] shouldn't be attending school and watch out." The last phone call Nihipali received was from a male who told her to "stop lying, and that if [she] continue with this, then [she'll] get it."

Nihipali testified that after January of 1999, she "always" saw Lopez on campus. She was not sure if he saw her on these occasions because the minute she saw him, she would walk the other way. She testified she never personally saw him going to the places where she socialized. Nihipali's information about Lopez was obtained from her friends Dara Ah You, Heather Wong, Sandy Degala, Quinn Kelsey, and David Kamakahi. Nihipali stated that "there's about 30 people that hang out there and they all seen it and stuff but there [sic] are the ones that he talks to." Nihipali testified about her friends at trial under cross-examination by Lopez's attorney as follows:

Q: [Lopez's attorney] Would you tell us who those friends are about Mr. Lopez trying to find you at school?

A: [Nihipali] I give you the names?

Q: Yes.

A: Oh, Dara, Heather, you wanted last names?

Q: Sure. What's Dara's last name?

A: Dara Ah You, Heather Wong.

Q: Wong?

A: Yes.

Q: Anyone else?

A: Sandy Degala, Quinn Kelsey.

Q: I'm sorry?

A: Quinn Kelsey and David Kamakahi and there's more people in the group but they're the ones that's exactly. There's other people there. There's like other people. They're like, in our area, there's about 30 people that hang out there and they all seen it and stuff but there [sic] are the ones that he talks to.

. . . .

Q: And are you saying that, could you tell the detective what each of these witnesses would tell the detective?

A: I told him that they're the ones that told me that they seen him up there and he's been asking for me and they told him what they had.

Q: Did any of your friends list Dara Ah You other than just looking for you, he didn't tell you that Mr. Lopez was trying to threaten you correct?

A: Oh no.

Q: Did Heather Wong ever tell you that after January of this year when she allegedly saw Mr. Lopez asking for you was he threatening you?

A: No.

Q: Did Sandy Degala, what did she tell you?

A: She said that he came up asking for me and then was talking to someone saying that if he finds me, he's going to kill me cause he called me and told me that. To not come up there since he's up there so I didn't go up there.

Q: And where is up there?

A: Campus Center.

Q: Mr. Kelly--

A: Kelsey.

Q: Kelsey.

A: Yes, he was with Sandy.

Q: And what did Mr. Kelsey tell you?

A: The same thing as Sandy that he came up looking for me and that he was talking to someone saying that if he finds me, he's going to kill me and smack me.

Q: And this is the day that all three, Sandy, Quinn and David and what did David tell you?

A: He just said that or I asked him and he said, yeah that's what he heard.

Q: He heard Mr. Lopez saying that?
A: Yes, he was with Quinn and Sandy.
Q: Any other names that-
A: No, not that I know of. He's talked to other people but I'm not sure.

II. STANDARD OF REVIEW

The court in Kawamata Farms, Inc. v. United Agri Products, 86 Hawai'i 214, 948 P.2d 1055 (1997), held:

It is well settled that the trial court has a very large measure of discretion in passing upon motions under Hawai'i Rules of Civil Procedure (HRCP) Rule 60(b) and its order will not be set aside unless we are persuaded that under the circumstances of the particular case, the court's refusal to set aside its order was an abuse of discretion.

Id. at 256, 948 P.2d at 1097 (internal quotation marks omitted).

"The trial court abuses its discretion when it clearly exceeds the bounds of reason or disregards rules or principles of law or practice to the substantial detriment of a party litigant."

Leslie v. Estate of Tavares, 91 Hawai'i 394, 399, 984 P.2d 1220, 1225 (1999) (internal quotation marks omitted).

III. DISCUSSION

Lopez appeals from the district court's denial of his DCRCP Rule 60(b) motion, contending that the district court abused its discretion in denying his motion absent an evidentiary hearing and/or because Lopez had refused to continue the hearing on the TRO petition pending disposition of his criminal case. Lopez contends that Nihipali's testimony at trial clearly and

convincingly amounted to fraud, which prevented Lopez from fully and fairly presenting his case.

District Court Rules of Civil Procedure Rule 60(b)(3) (Relief from Judgment or Order) provides in relevant part as follows:

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On motion and upon such terms as are just, the court may relieve a party or the party's legal representative from a final judgment, order, or proceeding for the following reasons: . . . (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party[.]

The district court Rule 60(b)(3) is identical to Hawai'i Rules of Civil Procedure (HRCPP) Rule 60(b)(3), which is patterned after Federal Rule of Civil Procedure (FRCP) Rule 60(b)(3). "Where we have patterned a rule of procedure after an equivalent rule within the FRCP, interpretations of the rule 'by the federal courts are deemed to be highly persuasive in the reasoning of this court.'" Kawamata Farms, 86 Hawai'i at 251-52, 948 P.2d at 1092-93 (internal quotation marks omitted).

The United States Court of Appeals for the Ninth Circuit interpreted FRCP Rule 60(b)(3) as requiring proof "(1) . . . by clear and convincing evidence that the verdict was obtained through fraud, misrepresentation, or other misconduct [, and] (2) . . . that the conduct complained of prevented the losing party from fully and fairly presenting his case or defense." Kawamata Farms, 86 Hawai'i at 252, 948 P.2d at 1093 (quoting Jones v. Aero/Chem Corp., 921 F.2d 875, 878-79 (9th

Cir. 1990)). In In re Intermagnetics America, Inc., 926 F.2d 912, 916-17 (9th Cir. 1991), the Ninth Circuit discussed the finding in Hazel-Atlas Glass Co. v. Hartford Empire Co., 322 U.S. 238, 246, 64 S.Ct. 997, 1001 (1944), overruled on other grounds, that the inquiry which would set aside a final judgment based on fraud under Rule 60(b)(3) looks not so much at the resultant harm the fraud caused the opposing party, but whether the harm alleged impacts the integrity of the judicial process.

Lopez contends the trial court abused its discretion when it denied his 60(b) motion on the ground that Lopez refused to continue the hearing pending disposition of his criminal case. The trial court noted in its denial of Lopez's motion that "Respondent had opportunity to continue the hearing until the criminal case was disposed of and declined to do so."

At the hearing on Nihipali's TRO petition, the district court asked Lopez if he would be willing to stipulate to a three-year agreement on the injunction. The court alternatively offered Lopez a continuance of the hearing with the restraining order remaining in effect until after Lopez's trial date in his pending criminal case. Lopez's counsel declined the continuance. In denying Lopez's 60(b) motion, the district court's notation that Lopez had declined a continuance was not an abuse of discretion. The issue is not the trial court's notation on the continuance, but whether Lopez's 60(b) motion should have been

granted on the grounds of fraud, misrepresentation, or other misconduct by Nihipali.

Lopez, in his 60(b) motion, contended that Nihipali committed fraud upon the court. In support of his 60(b) motion, Lopez submitted affidavits of Quinn Kelsey (Kelsey) and David Kamakahi (Kamakahi). In his affidavit, Kelsey stated: "What ever [sic] I heard from what happened between D.J. and Kailene I heard from Kailene. I have never talked with or seen D.J. in my life." Kamakahi stated in his affidavit: "The only thing I have heard about the incident between DJ [and] Kailene I heard from my friend Dara Aiu. I never saw DJ [at] the campus center or at U.H."

Lopez failed to satisfy the requirement of DCRCP Rule 60(b)(3) that the movant prove by clear and convincing evidence that the verdict was obtained through fraud, misrepresentation, or other misconduct. Jones, 921 F.2d 878-79. Lopez contends his 60(b) motion proved by clear and convincing evidence that Nihipali committed perjury. Lopez attached affidavits from Kamakahi and Kelsey that Lopez claims directly contradict Nihipali's testimony. Kamakahi's and Kelsey's affidavits state they have never seen or talked with Lopez. Neither affiant states what he said or didn't say to Nihipali. The district court judge who conducted the hearing on Nihipali's TRO petition found these affidavits not to be clear and convincing evidence

that his order granting the TRO petition was obtained by fraud, misrepresentation, or other misconduct by Nihipali. The district court did not abuse its discretion in concluding it was not misled in granting Nihipali's TRO petition.

Lopez also failed to satisfy the requirement of HRCF Rule 60(b)(3) requiring the movant to establish that the conduct complained of prevented the losing party from fully and fairly presenting its case or defense. Jones, 921 F.2d at 879. Even if Nihipali's statements in the hearing were false regarding Kamakahi and Kelsey, that did not prevent Lopez from fully and fairly presenting his case. Lopez had the opportunity to call witnesses and present evidence at the hearing and declined to do so.

Lopez contends the district court abused its discretion when it denied his 60(b) motion without holding an evidentiary hearing. This argument is without merit. District Court Rules of Civil Procedure Rule 78 provides that motions may be decided "without oral hearing upon brief written statements of reasons in support and opposition." The district court properly decided the 60(b) motion based on Lopez's written submissions and documents without holding an evidentiary hearing. See Wilder v. Tanouye, 7 Haw. App. 247, 251, 753 P.2d 816, 820 (1988) (holding that HRCF Rule 78 sets forth the procedure allowing the judge discretion to

dispense with oral hearings and decide motions upon "brief written statements of reasons in support and opposition.")¹

IV. CONCLUSION

The district court did not abuse its discretion in denying Lopez's Motion to Vacate Order Granting Petition for Injunction Against Harassment. Accordingly, we affirm the district court's denial of Lopez's 60(b) motion.

DATED: Honolulu, Hawai'i, January 30, 2001.

On the briefs:

Hayden Aluli
for Respondent-Appellant

Acting Chief Judge

Lynne M. Youmans
Zibilla Lee Wolfe
for Petitioner-Appellee

Associate Judge

Associate Judge

¹ HRCF Rule 78 is identical to DCRCF Rule 78.