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NO. 27716

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

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STATE OF HAWAII

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NANCY B. HARLESS, Trustee of the Nancy B. Harless
Declaration of Trust, and SUSAN HOLDER, Trustee of the
Susan Holder Trust, Plaintiffs-Appellees, v. KAREN
SCHLEIF, Defendant-Appellant

APPEAL FROM THE CIRCUIT COURT OF THE THIRD CIRCUIT
(Civ. No. 05-1-139K)

MEMORANDUM OPINION

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

Defendant-Appellant Karen Schleif (Schleif) appeals from the order entered by the Circuit Court of the Third Circuit (the circuit court)¹ on December 30, 2005, denying her November 2, 2005 motion to strike the Notice of Pendency of Action (NOPA) filed by Plaintiffs-Appellees Nancy B. Harless, Trustee of the Nancy B. Harless Declaration of Trust, and Susan Holder, Trustee of the Susan Holder Trust (collectively, Plaintiffs) against Schleif's real property in South Kona, Hawai'i.

We reverse.

BACKGROUND

Plaintiffs own real property adjacent to real property owned by Schleif in South Kona, Hawai'i. On July 27, 2005,

¹The Honorable Elizabeth A. Strance presided.

Plaintiffs filed a complaint in the circuit court, alleging that Schleif, "without proper governmental permits, wrongfully altered the grading on [Schleif's] property, and has altered the grade of Plaintiffs' property without Plaintiffs' permission. Plaintiffs' property has now been forced to support [Schleif's] property." The complaint further alleged that the "foregoing wrongful actions of [Schleif] constitute a continuing trespass on Plaintiffs' property" and "were, and continue to be, knowing, willful, and deliberate." Plaintiffs claimed that they "have been and continue to be damaged by [Schleif's] wrongful actions" and were entitled to compensatory and punitive damages and specific performance. Plaintiffs prayed for "[a]n injunction and decree ordering [Schleif] specifically to correct the grading on [Schleif's] property, and to construct whatever supporting wall is required to restore Plaintiffs' property to its original state[.]" Plaintiffs also prayed for damages as may be proven, an award of attorneys' fees and costs, judgment awarding punitive damages, and such other relief as is just.

On July 28, 2005, Plaintiffs filed an NOPA, also referred to as a *lis pendens*, with the Bureau of Conveyances pursuant to Hawaii Revised Statutes (HRS) § 634-51 (Supp. 2005), giving notice that

Plaintiffs have in the above-entitled action, filed a complaint against [Schleif], which seeks compensatory and punitive damages, and, among other things, specific

performance to correct the grading to certain real property whereby [Schleif] must correct the grading on her property, construct a retaining wall, and pay for correcting the grading of Plaintiffs' land, affecting certain real property situate in the District of South Kona, Island and County of Hawaii, State of Hawaii[.]

On November 2, 2005, Plaintiffs filed an amended complaint that added an assertion that they were "entitled to have the title to [Schleif's] property altered and encumbered to grant perpetual support from [Schleif's] property in favor of Plaintiff's [sic] property." The amended complaint also requested that the circuit court alter "the title to [Schleif's] property to . . . grant an easement and the right of perpetual support by [Schleif's] property in favor of Plaintiff's [sic] property."

On the same day that the amended complaint was filed, Schleif filed a motion to strike the NOPA. On November 23, 2005, Plaintiffs filed a memorandum in opposition to the motion to strike the NOPA. In their memorandum, Plaintiffs asserted that they were seeking more than money damages; they were seeking "to have their land restored to its state before [Schleif] altered it in significant ways." Plaintiffs also stated:

Plaintiffs do assert a claim title to [Schleif's] land; not to the entire title, but to a significant portion of the title. Plaintiffs seek the remedy of having support structures erected and maintained on [Schleif's] land. [Schleif] trivializes this remedy as "to possibly reduce Plaintiff's [sic] money damages in the future." The reality is that Plaintiffs seek, and the evidence will demonstrate that the appropriate remedy here is, to transfer a significant part of [Schleif's] title rights to the

Plaintiffs' land in the form of easements of support, access, etc.

On December 30, 2005, the circuit court entered an order denying Schleif's motion to strike the NOPA. The circuit court specifically found that the amended complaint "makes claims to lateral support and against Defendant's title."

Schleif timely filed a notice of appeal on January 17, 2006 on grounds that the circuit court erred in denying her motion to strike the NOPA.

STANDARD OF REVIEW

Whether a *lis pendens* should be expunged is a question to be resolved in the exercise of the trial court's discretion; accordingly, the trial court's decision is reviewed for an abuse of that discretion. In determining the validity of a *lis pendens*, courts have generally restricted their review to the face of the complaint.

The circuit court abuses its discretion if it bases its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence. Stated differently, an abuse of discretion occurs where the circuit court has clearly exceeded the bounds of reason or has disregarded rules or principles of law or practice to the substantial detriment of a party litigant.

Lathrop v. Sakatani, 111 Hawai'i 307, 312, 141 P.3d 480, 485

(2006) (brackets, citations, and quotation marks omitted; block formatting revised).

DISCUSSION

A.

The state statute governing NOPAs is HRS § 634-51 (Supp. 2005), which provides, in pertinent part, as follows:

Recording of notice of pendency of action. In any action concerning real property or affecting the title or the right of possession of real property, the plaintiff, at the time of filing the complaint, and any other party at the time of filing a pleading in which affirmative relief is claimed, or at any time afterwards, may record in the bureau of conveyances a notice of the pendency of the action, containing the names or designations of the parties, as set out in the summons or pleading, the object of the action or claim for affirmative relief, and a description of the property affected thereby. From and after the time of recording the notice, a person who becomes a purchaser or incumbrancer of the property affected shall be deemed to have constructive notice of the pendency of the action and be bound by any judgment entered therein if the person claims through a party to the action[.]

(Emphasis added.) The Hawai'i Supreme Court has observed that

HRS § 634-51 is clearly a codification of the common law doctrine of *lis pendens*.

At common law under the doctrine of *lis pendens* the mere existence of a lawsuit affecting real property was considered to impart constructive notice that anyone who acquired an interest in the property after the suit was filed would be bound by any judgment in that suit.

Further,

the purpose of the doctrine was to assure that a court retained its ability to effect justice by preserving its power over the property, regardless of whether a purchaser had any notice of the pending suit. Courts and commentators acknowledged the doctrine's potentially harsh impact on innocent purchasers, but they willingly accepted this as a necessary concomitant to preserving the judicial power.

In this regard, the doctrine of *lis pendens* protected a plaintiff from having his or her claim to the property defeated by the subsequent alienation of the property to a bona fide purchaser during the course of the lawsuit.

However, to ameliorate the harsh effect of the common law rule on third parties, legislatures have, over time, enacted *lis pendens* statutes to limit the legal fiction of "constructive knowledge" of pending claims to those instances where a notice of *lis pendens* was recorded. In this respect, the history of *lis pendens* legislation has been construed as indicative of the intent to restrict rather than broaden application of *lis pendens*.

S. Utsunomiya Enters. Inc. v. Moomuku Country Club (hereinafter, Utsunomiya), 75 Haw. 480, 507-09, 866 P.2d 951, 965 (1994) (brackets and citations omitted).

"In determining the validity of a *lis pendens*, courts have generally restricted their review to the face of the complaint." Id. at 505, 866 P.2d at 964. Moreover, "the likelihood of success on the merits is irrelevant to determining the validity of the *lis pendens*." Id.

According to the Hawai'i Supreme Court:

[A] *lis pendens* may only be filed in connection with an action (1) "concerning real property," (2) "affecting title" to real property, or (3) "affecting . . . the right of possession of real property."

TSA Int'l Ltd. v. Shimizu Corp., 92 Hawai'i 243, 266, 990 P.2d 713, 736 (1999). A *lis pendens* is appropriate, "both at law and in equity" where a particular litigation involves "title to, or possession of, or right of possession of, identified property[.]" Kaapu v. Aloha Tower Dev. Corp., 72 Haw. 267, 269, 814 P.2d 396, 397 (1991). Although the *lis pendens* doctrine may be applied to actions other than foreclosures, application of the doctrine must be restricted "in order to avoid its abuse." Utsunomiya, 75 Haw. at 513, 866 P.2d at 967. "[T]he *lis pendens* statute must be strictly construed and . . . the application of *lis pendens* should be limited to actions *directly* seeking to obtain title to or possession of real property." Id. at 510, 866 P.2d at 966.

Therefore, a *lis pendens* based on a claim to an equitable lien against property is invalid. Id.

In Utsunomiya, the plaintiff paid a \$200,000 deposit to purchase some land but later rescinded the sale upon discovering that the seller was unable to convey "free and clear title" to the land. Id. at 485, 866 P.2d at 956. The plaintiff subsequently filed a lawsuit seeking a return of its deposit and other damages, and simultaneously filed a notice of *lis pendens* against the property. Id. at 485-86, 866 P.2d at 956-57. In holding that the *lis pendens* was invalid, the Hawai'i Supreme Court expressly declined to follow those cases that upheld the validity of a *lis pendens* even though title or possession to the property in question was not sought and where "the transaction upon which the action was based and the action itself [only] 'concerned' the land." Id. at 510, 866 P.2d at 966. In so holding, the supreme court adopted the reasoning of the California Court of Appeals in Urez Corp. v. Superior Court, 190 Cal. App. 3d 1141, 1149, 235 Cal. Rptr. 837, 842 (Cal. App. 2 Dist. 1987):

In Urez Corp., the plaintiff was a former holder of a second deed of trust on property in which the security interest was lost (the deed of trust was rendered defunct) when the property was sold at a foreclosure sale. The property was purchased by a corporation newly formed by one of the members of the original entity that owned the property subject to the plaintiff's second deed of trust. The plaintiff later filed a complaint alleging fraud with respect to the corporation's purchase of the property. In his complaint, the plaintiff sought: (1) a judicial

declaration "that he was the owner of a beneficial interest in the property and held a lien against it to secure payments of the amounts due under the second deed of trust," and (2) the imposition of a constructive trust on the property. 190 Cal. App. 3d at 1144, 235 Cal. Rptr. at 839. In holding that the *lis pendens* should have been expunged, the California Court of Appeals reviewed the history of the doctrine of *lis pendens* and then turned to the complaint, observing that the claims for relief at issue were

essentially a fraud action seeking money damages with additional allegations urged to support the equitable remedies of a constructive trust or an equitable lien. Plaintiff does not claim any ownership or possessory interest in the subject property. Rather, he seeks reinstatement or creation of a "beneficial" interest in the property for the purpose of securing payment of money owed him under his defunct second trust deed.

Id. at 1149, 235 Cal. Rptr. at 842. The court concluded:

The fact remains that plaintiff's purported interest does not go to legal title or possession of the subject property. Even before foreclosure, plaintiff was a lienholder whose lien did not transfer any interest in title. (Civ. Code, § 2888.) He does not seek rescission of the foreclosure sale or conveyance of the subject property to himself. At bottom, the "beneficial" interest plaintiff claims in the subject property is for the purpose of securing a claim for money damages. In our view, allegation of this interest is not an action affecting title or possession of real property.

We conclude, therefore, that *allegations of equitable remedies, even if colorable, will not support a lis pendens if, ultimately, those allegations act only as a collateral means to collect money damages.* It must be borne in mind that the true purpose of the *lis pendens* statute is to provide notice of pending litigation and not to make plaintiffs secured creditors of defendants nor to provide plaintiffs with additional leverage for negotiating purposes.

Id. at 1149, 235 Cal. Rptr. at 842-43 (emphasis added).

...

We find the discussion in *Urez* to be well-reasoned and therefore adopt it here. Such a narrow construction of Hawai'i's *lis pendens* statute is counseled by sound authority recognizing the real potential for abuse of *lis pendens*. Indeed, as we have noted, one court has acknowledged that

while the California lis pendens statute was designed to give notice to third parties and not to aid plaintiffs in pursuing claims, the practical effect of a recorded lis pendens is to render a defendant's property unmarketable and unsuitable as security for a loan. The financial pressure exerted on the property owner may be considerable, forcing him to settle not due to the merits of the suit but to rid himself of the cloud upon his title. The potential for abuse is obvious.

Utsunomiya, 75 Haw. at 510-12, 866 P.2d at 966-67 (brackets omitted).

B.

In their amended complaint, Plaintiffs alleged that Schleif's wrongful actions in altering and grading Schleif's property constituted a continuing trespass on Plaintiffs' property that forced Plaintiffs' property to support Schleif's property² and entitled Plaintiffs to: (1) injunctive relief to

²There is little case law in our jurisdiction discussing the nature and extent of property support rights. Professor Richard R. Powell, in his well-known treatise on real property, explains that

[r]ights and duties of lateral support are incidents of ownership and "run with the land." . . . In essence, this area of the law defines when the possessor of land supported by one or more nearby parcels (the "supported land") has the right to the continuance of that support, and when the possessor of supporting land breaches a duty by withdrawing that support. This relationship of rights and duties is imposed by law -- it is sometimes said to be "absolute," meaning that it exists independently of any grant or other agreement.

Richard R. Powell and Michael Allan Wolf, Powell on Real Property § 63.01[1] at 63-4 to 63-5 (2000) (citation and footnotes omitted). Additionally,

[l]iability for loss of lateral support accrues only when land subsides due to another landholder's act(s). Subsidence "is any movement of soil from its natural position." The movement may be in any direction and it may be of surface or subsurface soil. "A shifting, falling,

(continued...)

correct the grading on Schleif's property and construct and maintain on Schleif's property whatever supporting wall is required to restore Plaintiffs' property to its original state; (2) an alteration of the title to Schleif's property to grant an easement and right of perpetual support by Schleif's property in favor of Plaintiffs' property; and (3) damages, attorneys' fees and costs, and such other relief as is just.

On the face of their amended complaint, Plaintiffs did not claim direct title to, possession of, or right of possession to Schleif's property. Instead, Plaintiffs alleged that they were entitled to have title to Schleif's property "altered and encumbered to grant perpetual support from [Schleif's] property in favor of Plaintiff's [sic] property." That is, Plaintiffs sought to encumber Schleif's property to effectuate a possible

²(...continued)

slipping, seeping, or oozing of the soil is subsidence within the meaning of the term." Holes on the supported land qualify as subsidence. The amount of subsidence, however, must be substantial to warrant recovery, as courts "do not deal in trifles."

If the possessor of supporting land prevents subsidence by substituting artificial support for naturally occurring support, then no liability arises. In that case, the possessor of the supporting land continues to owe a duty to maintain the artificial support.

Id. § 63.01[2] at 63-6 to 63-7 (footnotes omitted).

Based on our review of the exhibits attached to memoranda filed in the proceedings below, we question whether Plaintiffs-Appellees Nancy B. Harless, Trustee of the Nancy B. Harless Trust, and Susan Holder, Trustee of the Susan Holder Trust (collectively, Plaintiffs) are complaining about the removal of lateral support from their property by Defendant-Appellee Karen Schleif (Schleif) or the encroachment of Schleif's property onto Plaintiffs' property.

equitable remedy for the damages that Schleif allegedly had caused. Given the restrictive approach that the Hawai'i Supreme Court has adopted for determining the validity of NOPAs or *lis pendens*, we conclude that the circuit court abused its discretion when it denied Schleif's motion to strike Plaintiffs' NOPA.

CONCLUSION

In light of the foregoing discussion, we reverse the order entered by the Circuit Court of the Third Circuit on December 30, 2005, denying Defendant-Appellant Karen Schleif's November 2, 2005 motion to strike the Notice of Pendency of Action filed by Plaintiffs-Appellees Nancy B. Harless, Trustee of the Nancy B. Harless Declaration of Trust, and Susan Holder, Trustee of the Susan Holder Trust.

DATED: Honolulu, Hawai'i, January 25, 2007.

On the briefs:

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