IN THE CIRCUIT COURT
OF THE THIRD CIRCUIT
STATE OF HAWAI'I

DAISY MITCHELL;
REBECCA MELENDEZ,
Petitioners,

vs.

KAMEHAMEHA SCHOOLS (BISHOP ESTATE);
HAWAII COUNTY PLANNING, JEFF DARROW,
IN HIS OFFICIAL CAPACITY AS DIRECTOR;
MARISSA HARMAN, IN HER PROFESSIONAL & OFFICIAL CAPACITY; G70; KAWIKA MCKEAGUE, IN HIS OFFICIAL CAPACITY; JANE DOES 1-20; DOE CORPORATIONS 1-20; DOE ENTITIES 1-20; AND DOE GOVERNMENTAL UNITS 1-20,
Respondents.

CIVIL NO. 3CCV-25-0000438
(Declaratory Judgment)

PETITIONERS' FIRST NOTICE OF ERRATA TO PETITIONERS' RESPONSE AND OPPOSITION TO RESPONDENTS G70 AND KAWIKA McKEAGUE'S MOTION TO DISMISS FIRST AMENDED PETITION FOR JUDICIAL REVIEW [DKT. 55, 57]

I. INTRODUCTION

Petitioners Daisy Mitchell and Rebecca Melendez respectfully submit this First Notice of Errata to correct the inadvertent omission of several authorities cited by Respondents G70 and Kawika McKeague in their Motion to Dismiss (Dkt. 55). These authorities were addressed in Petitioners' Final Oral Argument but were not specifically discussed in Petitioners' Response and Opposition (Dkt. 57). This Notice raises no new claims and seeks no new relief. Rather, it clarifies Petitioners' existing opposition using the authorities relied upon by Respondents themselves.

II. WAIANAE COAST NEIGHBORHOOD BOARD AND 1000 FRIENDS OF KAUAI

Respondents rely upon Waianae Coast Neighborhood Bd. v. Hawaiian Electric Co. and 1000 Friends of Kauai v. Department of Transportation in support of their timeliness argument.

Waianae Coast involved a proceeding commenced 196 days after publication — well beyond the statutory deadline. 1000 Friends of Kauai involved a lawsuit filed over two and a half years after the DOT decision.... This proceeding was filed in 29 days. Those cases do not apply here. Petitioners respectfully submit these authorities do not support dismissal because this proceeding was initiated within twenty-nine days after FEIS acceptance.

III. ELLIS v. CROCKETT

Respondents also rely upon Ellis v. Crockett.

"a party may amend his pleading once as a matter of course at any time before a responsive pleading is served."
Petitioners respectfully submit that no responsive pleading had been served by G70 or Kawika McKeague before the First Amended Petition was filed. Accordingly, Petitioners possessed the automatic right to amend under Rule 15.

IV. KEST v. HANA RANCH AND WESTERN CONTRACTING

Respondents further rely upon Kest v. Hana Ranch, Inc. and Western Contracting Corp. v. Bechtel Corp.

Petitioners respectfully submit that the claims against G70 and Mr. McKeague arise from the identical conduct, transaction, and occurrence alleged in the Original Complaint: the preparation, submission, and advancement of the challenged FEIS. Respondents themselves rely upon Rule 15(c) through Kest and Western Contracting. Petitioners do not concede Respondents' relation-back argument. As explained in Petitioners' Sur-Reply, Petitioners' Response (Docket 57) did not

address relation back because Respondents' Reply (Docket 81) argued for the first time that Petitioners had conceded that issue by silence, relying on Hong v. Estate of Graham. Petitioners expressly disputed that alleged concession in the Sur-Reply. Petitioners further submit that Rule 15(c) supports relation back here because the claims against G70 and Mr. McKeague arise from the same conduct, transaction, and occurrence alleged in the Original Complaint. G70's involvement in the challenged FEIS was already identified in the Original Complaint (Docket 1, pp. 5, 7, and 17), and the First Amended Petition merely expands upon those same underlying allegations.

"Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading."
Petitioners further quoted Western Contracting:
"Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth in the original pleading, the amendment relates back to the date of the original pleading."

Petitioners respectfully submit that the claims against G70 and Mr. McKeague arise from the identical conduct, transaction, and occurrence alleged in the Original Complaint: the preparation, submission, and advancement of the challenged FEIS.

V. WILSON v. UNITED STATES AND BARROW v. WETHERSFIELD POLICE DEPARTMENT

Respondents also rely upon Wilson v. United States and Barrow v. Wethersfield Police Department.

Wilson addressed a plaintiff who intentionally sued one party and, after the limitations period, attempted to add a different defendant because he later learned that party might be liable.

Petitioners further explained:

Barrow involved unidentified officers of the Wethersfield Police Department where excessive force was alleged — the plaintiff did not know who the proper parties were.

Petitioners respectfully submit:

Neither situation applies here. Our action was timely initiated and the amendments arise from the same underlying FEIS and related conduct.

VI. E. STAR, INC. v. UNION BUILDING MATERIALS CORP.

Respondents rely upon E. Star, Inc. v. Union Building Materials Corp. in support of dismissing Respondent Kawika McKeague. Petitioners respectfully submit that Respondents' own authority supports, rather than defeats, the allegations against Mr. McKeague.

"The established law is that corporate officers, directors, or shareholders are not personally liable for the tortious conduct of the corporation or its other agents, **unless** there can be found some active or passive participation in such wrongful conduct by such persons."

The Court further stated:
"Where there is participation in the tortious conduct, they are not shielded by the corporation and will be personally liable."

The Court further stated:
"Consequently, a corporate officer or director who participates in the acts proscribed by HRS §480-2 is a joint tortfeasor, jointly and severally liable with the corporation."

Finally, the Court held:

"There is substantial evidence of Kranz's active participation in the acts or practices proscribed by HRS §480-2. He is therefore not protected by the corporate shield and bears the risk of personal liability."

Petitioners allege exactly that—personal participation. Mr. McKeague personally signed the FEIS transmittal letter. Mr. McKeague personally received the Department of Water Supply correspondence identifying the 101-unit water allocation, personally received a second notice of the same discrepancy during the FEIS comment period, personally advanced an FEIS describing a 150-unit resort without reconciling that discrepancy, personally advanced an FEIS containing nonexistent sections, including Section 2.7, which was later relied upon in Kamehameha Schools' Response, and personally advanced an FEIS that expressly deferred the Ka Pa'akai analysis to a future permitting stage. G70's own authority supports keeping Mr. McKeague in this case. The principle E. Star establishes, that personal participation in wrongful conduct does not shield a corporate officer, applies equally here.

VII. KEALOHA v. MACHADO AND STATE v. ONE LOVE MINISTRIES

Respondents also rely upon Kealoha v. Machado and State v. One Love Ministries.

"In deciding a motion to dismiss for failure to state a claim, courts must interpret the complaint in the light most favorable to the plaintiff, and should dismiss only when it appears beyond doubt that the plaintiff can prove no set of facts in support of his or her claim that would entitle him or her to relief."

As well as:

"a complaint should not be dismissed for failure to state a claim **unless** it appears beyond doubt that the plaintiff can prove no set of facts in support of his or her claim that would entitle him or her to relief."

Petitioners further quoted State v. One Love Ministries:

"Our review of a motion to dismiss for lack of subject matter jurisdiction is based on the contents of the complaint, the allegations of which we accept as true and construe in the light most favorable to the plaintiffs."

The Court further stated:

"Dismissal is improper unless it appears beyond doubt that the plaintiffs can prove no set of facts in support of their claim which would entitle them to relief."

Petitioners respectfully submit that these authorities require the allegations of the First Amended Petition to be accepted as true and construed in the light most favorable to Petitioners. Petitioners have submitted extensive documentary exhibits supporting those allegations. Accordingly, dismissal is not warranted.

VIII. CONCLUSION

Petitioners respectfully request that the Court accept this First Notice of Errata. This Notice raises no new claim and seeks no new relief. Rather, it corrects the inadvertent omission of discussion concerning the authorities cited by Respondents G70 and Kawika McKeague in Docket 55.

For the foregoing reasons, Petitioners respectfully request that this Notice of Errata be considered together with Petitioners' Response and Opposition (Dkt. 57) in ruling upon Respondents G70 and Kawika McKeague's Motion to Dismiss (Dkt. 55).

DATED: Kailua-Kona, Hawai'i, _____, 2026.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing PETITIONERS' FIRST NOTICE OF ERRATA TO PETITIONERS' RESPONSE AND OPPOSITION TO RESPONDENTS G70 AND KAWIKA McKEAGUE'S MOTION TO DISMISS FIRST AMENDED PETITION FOR JUDICIAL REVIEW [DKT. 55, 57] was duly served upon all counsel of record by depositing the same in the United States Mail, postage prepaid, on the date indicated below.

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DATED: Kailua-Kona, Hawai'i, July 1, 2026.

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EXHIBIT 1

ELLIS v. CROCKETT

51 Haw. 45, 451 P.2d 814 (1969)

Authority Regarding Amendment of Pleadings Under HRCP Rule 15(a)

Ellis v. Crockett

Full Name: Ellis v. Crockett

Citation: 451 P.2d 814

Docket Number: 4706

Date: February 25, 1969

451 P.2d 814 (1969)

William S. ELLIS, Jr., Florence A. Ellis, Masaru Sumida, Stanley Unten, Charley Shiraishi v. William F. CROCKETT, Lyman T. Harada, Katsuyo Harada, Stephen T. Harada, and William H. Balthis.

No. 4706.

Supreme Court of Hawaii.

February 25, 1969.

As Amended and Rehearing Denied March 12, 1969.

Ralph E. Corey, Honolulu, for appellants, except Ellis.

William S. Ellis, Jr., pro se.

William F. Crockett, Crockett & Crockett, Wailuku, Maui, for appellees.

Before RICHARDSON, C.J., MARUMOTO, ABE and LEVINSON, JJ., and KING, Circuit Judge, assigned by reason of vacancy.

averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." As prolix as the complaint is, the plaintiffs have not shown with particularity who made the false representations to the court, what the substance of the representations was, and what the plaintiffs believe to be the true facts. Therefore, this alleged "cause of action" is defectively stated.

2. The Right to Amend

The trial court erred in refusing to permit the complaint to be amended and we, therefore, remand the case to permit the amendment. We decline to speculate as to whether an amended complaint will be legally sufficient. It would be inappropriate for us to evaluate possible amendments not yet considered by the trial court.

Before embarking upon the procedural path leading to the result we reach, it is essential that there be a clear *824 understanding of the nature of an order of dismissal. An order dismissing a complaint in its entirety is a judgment denying all relief to the plaintiff whose complaint is being dismissed. Because the order dismissing the entire case is in fact a judgment, it is governed by the Hawaii Rules of Civil Procedure applicable to judgments. Thus, for example, H.R.C.P., Rule 58 providing that the judgment is not effective until filed or entered is equally applicable to orders dismissing a case. Likewise, the time limitations for the entry of judgment for purposes of appeal under Rule 73 and the requirement for notice upon entry of judgment pursuant to Rule 77(d) are applicable to such an order.

We hold that the appellants were entitled to file an amended complaint as a matter of right. H.R.C.P., Rule 15(a) provides that **"[a] party may amend his pleading once as a matter of course at any time before a responsive pleading is served** * * *." As the defendants admit, a motion to dismiss is not a "responsive pleading" within the meaning of the rule. Kelly v. Delaware River Joint Commission, 187 F.2d 93, 94 (3d Cir.1951), Breier v. Northern California Bowling Proprietors' Assn., 316 F.2d 787, 789 (9th Cir.1963). Therefore, the mere service of the motion for dismissal cannot terminate the right to amend.

Since the granting of an order of dismissal does not become effective until entered pursuant to H.R.C.P., Rule 58 as indicated above, the oral granting of the motion cannot terminate the right to amend once as a matter of course. At the time the motion for dismissal was orally granted in this case, the judge was prohibited by Rule 15(a) from

EXHIBIT 2

KEST v. HANA RANCH, INC.

785 P.2d 1325 (Haw. App. 1990)

and

WESTERN CONTRACTING CORP. v. BECHTEL CORP.

885 F.2d 1196 (4th Cir. 1989)

Authorities Regarding Relation Back of Amendments Under HRCP Rule 15(c)

Kest v. Hana Ranch, Inc.

Full Name: Kest v. Hana Ranch, Inc.

Citation: 785 P.2d 1325

Docket Number: 13920

Date: January 31, 1990

785 P.2d 1325 (1990)

Malcolm KEST, Involuntary Plaintiff-Appellant, and Michael Palazzolo, Involuntary Plaintiff, and Aina O Kipahulu Association, a non-profit Hawaii corporation, Plaintiff, v. HANA RANCH, INC., a Delaware corporation, Defendant-Appellee, and John Does 1-10, Defendants.

No. 13920.

Intermediate Court of Appeals of Hawaii.

January 31, 1990.

*1326 Douglas J. Sameshima, Wailuku, Maui, Hawaii, on the briefs for involuntary plaintiff-appellant.

William F. Crockett (Crockett & Nakamura, of counsel), Wailuku, Maui, Hawaii, on the brief for defendant-appellee.

Before BURNS, C.J., and HEEN and TANAKA, JJ.

TANAKA, Judge.

Malcolm Kest (Kest), an involuntary plaintiff in an action commenced by plaintiff Aina O Kipahulu Association (the Association), appeals from the Second Circuit Court's summary judgment in favor of defendant Hana Ranch, Inc. (Hana Ranch) adjudicating certain claims alleged in his complaint. Kest contends that those claims were not time-barred. We hold that those claims did not "relate back" to the *1327 date of the Association's original complaint under Hawaii Rules of Civil Procedure (HRCP) Rule 15(c). Accordingly, we affirm the summary judgment.

I.

On September 18, 1978, the Association, a nonprofit Hawaii corporation, filed a complaint against Hana Ranch. The six-count complaint contains 36 paragraphs. The first eleven paragraphs are introductory in nature and the first paragraph in Count I is designated

Based on our analysis of HRCP Rule 15(c) and review of the pleadings, we conclude that Kest's claims for defective construction of the water system and roads do not "relate back" to the original complaint. Therefore, the statute of limitations has run on those claims.

*1329 A.

HRCP Rule 15(c) provides as follows:

(c) Relation Back of Amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

This rule is virtually identical to the analogous paragraph of Rule 15(c) of the Federal Rules of Civil Procedure (FRCP). Consequently, we will consider pertinent federal decisions interpreting FRCP Rule 15(c), since they are deemed "to be highly persuasive" in the construction of our Rule 15(c). Ellis v. Crockett, 51 Haw. 45, 61, 451 P.2d 814, 824 (1969).

B.

HRCP Rule 15(c) explicitly permits amendments that change parties against whom claims are asserted to relate back to the date of the original pleading. The rule, however, does not expressly apply to pleadings adding defendants and substituting or adding plaintiffs. Under FRCP Rule 15(c), the word "changing" has been "given a sensible and practical construction" to permit the adding of defendants. Meredith v. United Air Lines, 41 F.R.D. 34, 39 (S.D. Cal. 1966). See also Gridley v. Sayre & Fisher Co., 409 F. Supp. 1266 (D.S.D. 1976) (relation-back rule applied where a defendant was added when the original complaint was amended); 6 C. Wright & A. Miller, Federal Practice and Procedure: Civil § 1498 (1971). Likewise, Rule 15(c) "applies by analogy to the substitution of plaintiffs." Raynor Bros. v. American Cyanimid Co., 695 F.2d 382, 384 (9th Cir.1982). See also Allied Int'l, Inc. v. International Longshoremen's Ass'n, 814 F.2d 32, 35-36 (1st Cir.1987); 6 C. Wright & A. Miller, supra, § 1501.

Rule 15(c) has been deemed applicable where a plaintiff of record adds a person as a party plaintiff. Cunningham v. Quaker Oats Co., 107 F.R.D. 66 (W.D.N.Y. 1985). Our

research has not disclosed a Rule 15(c) case where the defendant added a person as an involuntary

EXHIBIT 3

E. STAR, INC.

v.

UNION BUILDING MATERIALS CORP.

6 Haw. App. 125, 712 P.2d 1148 (1985)

Authority Regarding Personal Liability of Corporate Officers for Their Own Participation in Wrongful Conduct

Eastern Star v. Union Bldg. Materials

Full Name: Eastern Star v. Union Bldg. Materials

Citation: 712 P.2d 1148

Docket Number: 9667

Date: November 26, 1985

712 P.2d 1148 (1985)

EASTERN STAR, INC., S.A., Plaintiff-Appellee, Cross-Appellant, v. UNION BUILDING MATERIALS CORP. and Keith Kranz, Defendants-Appellants, Cross-Appellees, Robert Graves, Inc. and Robert Graves, Defendants-Cross-Appellees, and Harold T. Kurisu, Defendant.

No. 9667.

Intermediate Court of Appeals of Hawaii.

November 26, 1985.

*1151 Alexander T. MacLaren (Walter G. Chuck and Artie M. Owen, III on the briefs; Walter T. Chuck, A Law Corp., of counsel), Honolulu, for defendants-appellants, cross-appellees.

Jack C. Morse (Morse, Nelson & Ross, Attorneys at Law, A Law Corp., of counsel), Honolulu, for plaintiff-appellee, cross-appellant.

Before BURNS, C.J., and HEEN and TANAKA, JJ.

TANAKA, Judge.

Defendants Union Building Materials Corporation (UBM) and Keith Kranz (Kranz) (UBM and Kranz hereinafter collectively Defendants) appeal from the judgment awarding to plaintiff Eastern Star, Inc., S.A. (Eastern Star) treble damages under Hawaii Revised Statutes (HRS) § 480-13(a)(1) (1976)[1] pursuant to the jury's special verdict. Eastern Star cross-appeals the trial court's dismissal of its common law fraud claim. We affirm the judgment awarding treble damages and reverse the dismissal of the fraud claim.

The issues raised by Defendants' appeal and our answers are:

I. Whether there was sufficient evidence to support the jury's finding that UBM committed unfair or deceptive acts or practices in violation of HRS § 480-2 (1976).[2] Yes.

II. Whether Kranz could have been found liable under HRS §§ 480-2 and -13(a)(1) on the law and the evidence. Yes.

At the April 21, 1980 meeting when Eastern Star terminated the Contract with Graves, Inc., Kranz represented that UBM had a contractor's license and that although Graves had no license, Graves was authorized by UBM to use its license. Legally, under these facts, UBM was the contractor with Graves or Graves, Inc. serving as UBM's agent. Thus, when the 50% performance and payment bond was issued, UBM was not a true surety but *1155 merely a guarantor of its own contractual obligations.[12]

When a 100% performance and payment bond was suggested at that meeting, it was Eastern Star's expectation that there would be a third-party surety.[13] However, UBM made no disclosure that UBM would be bonding itself without any third-party surety. Eastern Star's expectation coupled with UBM's nondisclosure induced Eastern Star to execute the Amended Contract to its detriment.

Without more, UBM's act would have been merely a breach of the Amended Contract. However, the evidence in the case portrays an unethical design by UBM to profit at the expense of the consuming public. UBM knowingly (1) allowed Graves, Inc. to illegally use UBM's contractor's license to enter into construction contracts, (2) served as the surety on performance and payment bonds required by those contracts, (3) charged administrative fees for the issuance of such bonds,[14] and (4) bonded itself without a third-party surety where UBM was the designated contractor.

The foregoing evidence was sufficient for the jury to find, as it did, that UBM committed unfair or deceptive trade acts or practices.

II. Kranz's Liability

Kranz contends that the jury erred in finding him liable for violation of HRS § 480-2 for the following reasons. First, since he was acting in the capacity of, and within the scope of his authority as, president of UBM, he has no individual liability for the unfair or deceptive trade practices or acts committed by UBM. Second, HRS § 480-17 (1976) limits individual liability of a corporate director, officer, or agent to the penal provisions of chapter 480. Third, he was not a "merchant" as required by HRS § 480-13(a)(1). Fourth, the evidence was insufficient to support the jury's finding that he violated HRS § 480-2. We disagree with Kranz's contentions.

A. Individual Liability of Corporate Officer

The law and the evidence impose personal liability on Kranz despite his contention otherwise.

The established law is that corporate officers, directors, or shareholders "are not personally liable for the tortious conduct of the corporation or its other agents, unless there can be found some active or passive participation in such wrongful conduct by such persons." Cahill v. Hawaiian Paradise Park Corp., 56 Haw. 522, 526, 543 P.2d

1356, 1360 (1975). See also Rodriguez v. Nishiki, 65 Haw. 430, 653 P.2d 1145 (1982); 19 Am.Jur.2d Corporations § 1382 (1965). Where there is participation in the tortious conduct, "they are not shielded by the corporation and will be personally liable." Burgess v. Arita, 5 Haw. App. 581, 594, 704 P.2d 930, 939 (1985).

A treble damage action under HRS § 480-13(a)(1) based on violations of HRS § 480-2 is a tort action. Cf. Tondas v. Amateur Hockey Ass'n of U.S., 438 F. Supp. 310 (W.D.N.Y. 1977) (a private suit for treble damages is a tort action). Consequently, a corporate officer or director who participates in the acts proscribed by HRS § 480-2 is a joint tortfeasor, jointly and severally liable with the corporation.

*1156 There is substantial evidence of Kranz's active participation in the acts or practices proscribed by HRS § 480-2. He is therefore not protected by the corporate shield and bears the risk of personal liability.

B. Interpretation of HRS § 480-17

Section 480-17[15] imputes a corporation's violation of the "penal" provisions of chapter 480 to the individual corporate officers, directors, or agents who authorized, ordered, or did the violative act. Kranz therefore argues that the omission of "civil" provisions in HRS § 480-17 signifies that there can be no imposition of personal liability on corporate officers, directors, or agents in a "civil" proceeding under HRS § 480-13(a)(1) grounded on the corporation's violation of HRS § 480-2. We disagree.

As instructed by HRS § 480-3, we will construe HRS § 480-17 in accordance with the federal judicial interpretation of its counterpart, section 14 of the Clayton Act, 15 U.S.C. § 24 (1982), which provides:

Liability of directors and agents of corporation. Whenever a corporation shall violate any of the penal provisions of the antitrust laws, such violation shall be deemed to be also that of the individual directors, officers, or agents of such corporation who shall have authorized, ordered, or done any of the acts constituting in whole or in part such violation, and such violation shall be deemed a misdemeanor, and upon conviction therefor of any such director, officer, or agent he shall be punished by a fine of not exceeding $5,000 or by imprisonment for not exceeding one year, or by both, in the discretion of the court.

Section 14 was never intended to do away with the civil liability of corporate directors, officers, and agents. The section was added in 1914 for the purpose of making it clear that corporate directors, officers, and agents as well as the corporate entity itself could be held

EXHIBIT 4

KEALOHA v. MACHADO

131 Hawai'i 62, 315 P.3d 213 (2013)

Authority Regarding the Standard for Dismissal Under HRCP Rule 12(b)(6)

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IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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SAMUEL L. KEALOHA, JR., VIRGIL E. DAY, JOSIAH L. HOOHULI, and PATRICK L. KAHAWAIOLAA, Petitioners/Plaintiffs-Appellants,

vs.

COLETTE Y. PI'IPI'I MACHADO, individually and in her official capacity as Chairperson and Trustee of the Office of Hawaiian Affairs; S. HAUNANI APOLIONA, ROWENA AKANA; DONALD CATALUNA; BOYD P. MOSSMAN; OSWALD STENDER; PETER APO; ROBERT K. LINDSEY, JR.; and JOHN D. WAIHE'E IV, individually and in their official capacity as Trustees of the Office of Hawaiian Affairs; and DANTE CARPENTER and WALTER HEEN, individually, Respondents/Defendants-Appellees.

SCAP-11-0001103

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CAAP-11-0001103; CIV. NO. 11-1-0575-03)

DECEMBER 3, 2013

RECKTENWALD, C.J., NAKAYAMA, ACOBA, AND McKENNA, JJ., AND CIRCUIT JUDGE KIM, IN PLACE OF POLLACK, J., RECUSED

OPINION OF THE COURT BY RECKTENWALD, C.J.

Samuel L. Kealoha, Jr., Virgil E. Day, Josiah L. Hoohuli, and Patrick L. Kahawaiolaa (collectively, Plaintiffs),

(2) Whether dismissal is appropriate on grounds of res judicata or collateral estoppel?

In deciding a motion to dismiss for failure to state a claim, courts must interpret the complaint in the light most favorable to the plaintiff, and should dismiss only when "it appears beyond doubt that the plaintiff can prove no set of facts in support of his or her claim that would entitle him or her to relief." County of Kaua'i v. Baptiste, 115 Hawai'i 15, 24, 165 P.3d 916, 925 (2007) (citation omitted). Applying that test here, we hold that the circuit court did not err in dismissing Plaintiffs' complaint.[4] We also hold that the circuit court did not abuse its discretion in denying Plaintiffs' motion for leave to file an amended complaint. Accordingly, we affirm the circuit court's December 6, 2011 judgment.

I. Background

A. Public trust funds

The Hawai'i Admission Act (Admission Act), Pub. L. No. 86-3, 73 Stat. 4 (1959), reprinted in 1 HRS 135 (2009), made Hawai'i a state of the Union. As a condition of admission, "the State of Hawai'i agreed to hold certain lands granted to the State by the United States in a public land trust," subject to the trust provisions set forth in § 5(f) of the Admission Act. Corboy v. Louie, 128 Hawai'i 89, 92, 283 P.3d 695, 698 (2011) (citing Office of Hawaiian Affairs v. State, 96 Hawai'i 388, 390,

[4] In light of this holding, we do not reach the issue of whether res judicata or collateral estoppel bar Plaintiffs' claims.

by expending funds for the challenged programs, (3) the Plaintiffs have not explained how incidental benefits to non-native Hawaiians render the expenditures to be outside the OHA trustees' discretion, and (4) the Plaintiffs' claim for breach of trust under state law is barred by collateral estoppel.

II. Standards of Review

A. Motion to Dismiss

A circuit court's ruling on a motion to dismiss is reviewed de novo. Sierra Club v. Dep't of Transp., 115 Hawai'i 299, 312, 167 P.3d 292, 305 (2007). It is well-established that

> [a] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his or her claim that would entitle him or her to relief. [The appellate court] must therefore view a plaintiff's complaint in a light most favorable to him or her in order to determine whether the allegations contained therein could warrant relief under any alternative theory. For this reason, in reviewing [a] circuit court's order dismissing [a] complaint . . . [the appellate court's] consideration is strictly limited to the allegations of the complaint, and [the appellate court] must deem those allegations to be true.

Baptiste, 115 Hawai'i at 24, 165 P.3d at 925 (some brackets in original and some added) (quoting In re Estate of Rogers, 103 Hawai'i 275, 280-81, 81 P.3d 1190, 1195-96 (2003)). "However, in weighing the allegations of the complaint as against a motion to dismiss, the court is not required to accept conclusory allegations on the legal effect of the events alleged." Pavsek v. Sandvold, 127 Hawai'i 390, 403, 279 P.3d 55, 68 (App. 2012)

EXHIBIT 5

STATE v. ONE LOVE MINISTRIES

76 Haw. 373, 878 P.2d 704 (1994)

Authority Regarding the Standard for Reviewing Motions to Dismiss for Lack of Subject Matter Jurisdiction

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IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

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STATE OF HAWAI'I, Plaintiff-Appellee,
and
Ex Rel. MITCHELL KAHLE and HOLLY HUBER,
Plaintiffs-Relators-Appellees,
v.
ONE LOVE MINISTRIES and CALVARY CHAPEL CENTRAL OAHU,
Defendants-Appellants,
and
DOE ENTITIES 1-50; JOHN DOES 1-50; and JANE DOES 1-50,
Defendants.

NO. CAAP-14-0001343

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CIVIL NO. 13-1-0893-03)

FEBRUARY 28, 2018

NAKAMURA, CHIEF JUDGE, and REIFURTH and CHAN, JJ.

OPINION OF THE COURT BY NAKAMURA, C.J.

Plaintiffs-Relators-Appellees Mitchell Kahle and Holly Huber (Relators) brought a *qui tam* action[1/] on behalf of the State of Hawai'i (State) against Defendants-Appellants One Love

[1/] "'*Qui tam*' is an abbreviation for '*qui tam pro domino rege quam pro seipso*,' which literally means 'he who as much for the king as for himself.'" United Seniors Ass'n, Inc. v. Phillip Morris USA, 500 F.3d 19, 24 (1st Cir. 2007) (internal quotation marks and citation omitted). Generally, statutes authorizing *qui tam* actions permit a private person, known as a "relator," to bring a civil action on behalf of the government against an individual or company who has knowingly presented a false of fraudulent claim for payment to the government.

omitted). We review a trial court's ruling on a motion to dismiss under HRCP Rule 12(b)(6) de novo. Wright v. Home Depot U.S.A., Inc., 111 Hawai'i 401, 406, 142 P.3d 265, 270 (2006).

Unlike a motion to dismiss under HRCP Rule 12(b)(6), the standard for a court to apply in deciding a motion to dismiss under HRCP Rule 12(b)(1) for lack of jurisdiction permits a court, under certain circumstances, to consider evidence outside the complaint and to resolve factual disputes. The Hawai'i Supreme Court has adopted the following standard regarding a motion to dismiss under HRCP Rule 12(b)(1):

> Our review of a motion to dismiss for lack of subject matter jurisdiction is based on the contents of the complaint, the allegations of which we accept as true and construe in the light most favorable to the plaintiffs. Dismissal is improper unless "it appears beyond doubt that the plaintiffs can prove no set of facts in support of their claim which would entitled them to relief."
>
> [Love v. United States, 871 F.2d 1488, 1491 (9th Cir. 1989)]. However, "when considering a motion to dismiss pursuant to HRCP Rule 12(b)(1) the trial court is not restricted to the face of the pleadings, but may review any evidence, such as affidavit and testimony, to resolve factual disputes concerning the existence of jurisdiction." McCarthy, 850 F.2d at 560 (citations omitted); see also 5A C. Wright & A. Miller, Federal Practice and Procedure § 1350, at 213 (1990).

Yamane v. Pohlson, 111 Hawai'i 74, 81, 137 P.3d 980, 987 (2006) (brackets omitted).

In considering motions to dismiss for lack of jurisdiction under HRCP Rule 12(b)(1), we have joined other courts in distinguishing between facial and factual challenges to subject matter jurisdiction under HRCP Rule 12(b)(1). State v. Alagao, 77 Hawai'i 260, 262, 883 P.2d 682, 684 (App. 1994); Hopper v. Solvay Pharmaceuticals, Inc., 590 F. Supp. 2d 1352, 1358 (M.D. Fla. 2008). A facial challenge asserts that the absence of jurisdiction can be established by considering only the allegations of the complaint itself. The standard applicable to a facial challenge to jurisdiction under HRCP Rule 12(b)(1) is basically the same as that applied for failure to state a claim under HRCP Rule 12(b)(6) -- the allegations of the complaint must

Exhibit 6

WAIANAE COAST NEIGHBORHOOD BOARD
v.
HAWAIIAN ELECTRIC COMPANY

64 Haw. 126, 637 P.2d 776 (1981)

and

1000 FRIENDS OF KAUAI
v.
DEPARTMENT OF TRANSPORTATION

Summary Disposition Order
(Not for Publication in West's Hawai'i Reports and Pacific Reporter)

Submitted in support of Section II of Petitioners' First Notice of Errata.

As discussed in the Errata, Respondents rely upon these authorities in support of their timeliness argument. Petitioners respectfully submit that these cases do not support dismissal because Waianae Coast involved a proceeding commenced beyond the statutory deadline, 1000 Friends involved a lawsuit filed more than two years after the agency decision, whereas Petitioners initiated this proceeding twenty-nine (29) days after acceptance of the FEIS.

Information taken from website https://law.justia.com/cases/hawaii/supreme-court/1981/6706-2.html

Waianae Coast Neighborhood v. Haw. Elec. Co.

Full Name: Waianae Coast Neighborhood v. Haw. Elec. Co.

Citation: 637 P.2d 776

Docket Number: 6917

Date: December 17, 1981

637 P.2d 776 (1981)

WAIANAE COAST NEIGHBORHOOD BOARD; Nanakuli Hawaiian Homesteaders Association, Inc., a Hawaii non-profit corporation; Life of the Land, a Hawaii non-profit corporation; Peter Apo; and Rose L. Jackman, Plaintiffs-Appellants, v. HAWAIIAN ELECTRIC COMPANY, INC., a Hawaii corporation; Department of Land Utilization; George S. Moriguchi; City Council for the City and County of Honolulu; and Marilyn Bornhorst, Defendants-Appellees.

No. 6917.

Supreme Court of Hawaii.

December 17, 1981.

John F. Schweigert, Honolulu (Lawrence D. McCreery and Walter Zulkoski, Honolulu, with him on the briefs), for plaintiffs-appellants.

Hugh Shearer, Honolulu (David L. Fairbanks, Honolulu, with him on the brief, Goodsill Anderson & Quinn, Honolulu, of counsel), for defendant-appellee, Hawaiian Electric Co., Ltd.

Before RICHARDSON, C.J., OGATA, LUM and NAKAMURA, JJ., and MARUMOTO, Retired Justice, assigned in place of MENOR, J., excused.

PER CURIAM.

Plaintiffs-Appellants, Waianae Coast Neighborhood Board, Nanakuli Hawaiian *777 Homesteaders Association, Inc., a Hawaii non-profit corporation, Life of the Land, a Hawaii non-profit corporation, Peter Apo, and Rose Jackman (hereinafter referred to as "Appellants"), have appealed from the Order Granting Summary Judgment and Final Judgment dated December 15, 1977, made and entered against them by the First Circuit Court, and in favor of Defendants-Appellees Hawaiian Electric Company, Inc., Department

of Land Utilization, George S. Moriguchi, City Council for the City and County of Honolulu, and Marilyn Bornhorst (hereinafter referred to as "Appellees").

Upon the basis of the record submitted to us, we affirm.

A careful analysis of the record reveals that on February 14, 1977, the Appellee Hawaiian Electric Company filed with the Appellee Department of Land Utilization of the City and County of Honolulu (hereinafter referred to as "DLU") a Request for an Assessment with reference to a permit for the proposed addition of a sixth generating unit at Kahe, Oahu, pursuant to HRS § 205A-28 (1975 Supp.), and Ordinance No. 4529, as amended, of the City and County of Honolulu. It was known at that time that this sixth generating plant (hereinafter referred to as "Kahe 6"), which has since been completed and is now operational, would be constructed within a coastal zone management area as defined in HRS Ch. 205A and in Ordinance No. 4529, as amended. However, the construction of Kahe 6 did not involve the use of any State or County lands or funds or the use of any land described in HRS § 343-4(a)2 (1975 Supp.). In fact, no construction work was required to be done within the shoreline area or in the ocean waters offshore by the addition of Kahe 6. Subsequently, DLU's Negative Declaration was issued. It was dated March 18, 1977, and filed with the Environmental Quality Commission (hereinafter referred to as "EQC") on March 22, 1977. Thereafter it was filed with the City Council on May 17, 1977. Notice of the Negative Declaration was published for public information in the EQC bulletin on April 8, 1977.

The complaint and notice of appeal appealing the DLU's Negative Declaration to the Circuit Court was filed on October 21, 1977.

Section 343-1 of HRS Chapter 343, relating to "Environmental Quality Commission and Environmental Impact Statements," contains the definitions of the terms used therein. That section states:

§ 343-1 Definitions. As used in this chapter unless the context otherwise requires: (1) "Acceptance" means a formal determination by an agency, the governor of the State, or the mayor of a county, that the document required to be filed pursuant to section 343-4 fulfills the definition of an environmental impact statement, adequately describes identifiable environmental impacts, and satisfactorily responds to comments received during the...

NO. 28845

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

1000 FRIENDS OF KAUAI, a Hawaii non-profit corporation, and RICHARD HOEPPNER, an individual,
Petitioners-Appellants,
v.
THE DEPARTMENT OF TRANSPORTATION, STATE OF HAWAII; BRENNON MORIOKA,[1] in his capacity as Director of the DEPARTMENT OF TRANSPORTATION OF THE STATE OF HAWAII; MICHAEL FORMBY, in his capacity as Director of Harbors of the DEPARTMENT OF TRANSPORTATION OF THE STATE OF HAWAII; and HAWAII SUPERFERRY, INC.,
Respondents-Appellees

APPEAL FROM THE CIRCUIT COURT OF THE FIFTH CIRCUIT
(CIVIL NO. 07-1-0131)

SUMMARY DISPOSITION ORDER
(By: Foley, Presiding Judge, Nakamura and Fujise, JJ.)

Petitioners-Appellants 1000 Friends of Kauai, a Hawai'i non-profit corporation, and Richard Hoeppner (collectively, Petitioners) appeal from the Final Judgment filed on October 12, 2007 in the Circuit Court of the Fifth Circuit (circuit court).[2] The circuit court entered judgment in favor of Respondents-Appellees the Department of Transportation, State of Hawai'i (DOT); Brennon Morioka, in his capacity as Director of DOT; Michael Formby, in his capacity as Director of Harbors of DOT; and Hawaii Superferry, Inc. (HSI) (collectively, Respondents) and against Petitioners.

On appeal, Petitioners argue that the circuit court erred by (1) finding that Petitioners' claims under the Hawai'i

[1] On December 3, 2007, Brennon Morioka succeeded Barry Fukunaga as Director of the Department of Transportation of the State of Hawaii and Mr. Morioka is automatically substituted as Appellee herein pursuant to Hawai'i Rules of Appellate Procedure Rule 43(c)(1).

[2] The Honorable Randal G.B. Valenciano presided.

Environmental Policy Act (HEPA) were time-barred pursuant to Hawaii Revised Statutes (HRS) § 343-7 (1993); (2) finding that Petitioners' failure to meet the 120-day time limit in HRS § 343-7 was jurisdictional; (3) finding that Sierra Club v. Department of Transportation, 115 Hawai'i 299, 167 P.3d 292 (2007), applied only to Maui and not the entire state of Hawai'i; (4) finding that the presumption of harm relating to HEPA violations was unavailable for Petitioners' constitutional and injunctive relief claims; and (5) denying Petitioners' request for a temporary restraining order. Petitioners also argue that Act 2 of the 2007 Hawaii Session Laws, Second Special Session, at 5-21, is unconstitutional.

Petitioners ask this court to vacate the Final Judgment and remand with instructions to issue an injunction until the petition is heard on the merits.

Upon careful review of the record and the briefs submitted by the parties and having given due consideration to the arguments advanced and the issues raised by the parties, as well as the relevant statutory and case law, we resolve Petitioners' points of error as follows:

The circuit court did not err in concluding that Petitioners' claims were time-barred pursuant to HRS § 343-7. HRS § 343-7 provides in relevant part:

> **§343-7 Limitation of actions.** (a) Any judicial proceeding, the subject of which is the lack of assessment required under section 343-5, shall be initiated within one hundred twenty days of the agency's decision to carry out or approve the action, or, if a proposed action is undertaken without a formal determination by the agency that a statement is or is not required, a judicial proceeding shall be instituted within one hundred twenty days after the proposed action is started.

(Emphasis added.) The plain and unambiguous language of this statute sets forth a 120-day limitation period that commences on the date "of the agency's decision to carry out or approve the action." Id.

In this case, the date of DOT's decision was February 23, 2005. See Sierra Club, 115 Hawai'i at 312 n.15, 167 P.3d at 305, n.15 ("[W]e note that the lawsuit was filed on March 21, 2005, which was 'within one hundred twenty days of the agency's decision to carry out or approve the action,' HRS § 343-7(a), taking the date of that decision as February 23, 2005, when DOT officially determined that the harbor improvements would be exempt from the requirements of HEPA."). Petitioners filed the instant suit on September 4, 2007, beyond the 120-day limitation period. The circuit court did not err, therefore, in concluding that Petitioners' claims were time-barred pursuant to HRS § 343-7.

Furthermore, contrary to Petitioners' assertions, the 120-day time limit is indeed jurisdictional. In Waianae Coast Neighborhood Board v. Hawaiian Electric Co., 64 Haw. 126, 637 P.2d 776 (1981), the Hawai'i Supreme Court established that HRS § 343-6(b) (which was renumbered in 1979 as § 343-7(b), 1979 Haw. Sess. Laws Act 197, § 1.8. at 412-13) is "mandatory and jurisdictional," reasoning as follows:

> In *Ho v. Yee*, 42 Haw. 228, 229 (1957), we held therein that the time requirement of rule 73(a) of the Hawaii Rules of Civil Procedure which requires that an appeal be taken within 30 days after entry of judgment was jurisdictional. Similarly, we hold compliance with section 343-6(b) is likewise mandatory and jurisdictional.

64 Haw. at 128, 637 P.2d at 778 (emphases added).

We apply the same reasoning here. Like HRS § 343-7(b), which the Hawai'i Supreme Court deemed "mandatory and jurisdictional," the time requirement of subsection (a) is "mandatory and jurisdictional." See HRS § 1-16 (1993) ("Laws in pari materia, or upon the same subject matter, shall be construed with reference to each other.").

Because the circuit court did not err in concluding that Petitioners' claims were time-barred under HRS § 343-7, we do not address Petitioners' remaining points of error.

Therefore,

The Final Judgment filed on October 12, 2007 in the Circuit Court of the Fifth Circuit is affirmed.

DATED: Honolulu, Hawai'i, February 6, 2009.

On the briefs:

Daniel G. Hempey
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for Petitioners-Appellants.

Dorothy Sellers,
Solicitor General,
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State of Hawaii Department
of Transportation, Brennon
Morioka, and Michael Formby.

Lisa Woods Munger,
Lisa A. Bail
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& Stifel)
for Respondent-Appellee
Hawaii Superferry, Inc.

Presiding Judge

Associate Judge

Associate Judge