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IN THE SUPREME COURT OF THE STATE OF HAWAI'I

MARK C. KELLBERG,

Petitioner/Plaintiff-Appellant,

vs.

CHRISTOPHER J. YUEN in his capacity as
Planning Director, County of Hawai'i and
COUNTY OF HAWAI'I,

Respondents/Defendants-Appellees.

ON APPLICATION FOR A WRIT OF
CERTIORARI TO THE INTERMEDIATE
COURT OF APPEALS

ICA Opinion: June 20, 2013

ICA Judgment: July 19, 2013

Circuit Court:

Civil No. 07-1-0157

Circuit Court of the Third Circuit

Hon. Glenn S. Hara, Hon. Ronald Ibarra

Judgment: Feb. 28, 2012

**RESPONDENTS/DEFENDANTS-APPELLEES CHRISTOPHER J. YUEN in his capacity
as Planning Director, County of Hawai'i and COUNTY OF HAWAI'I'S OPPOSITION
TO APPLICATION FOR A WRIT OF CERTIORARI FILED SEPTEMBER 17, 2013**

CERTIFICATE OF SERVICE

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CHRISTOPHER J. YUEN in his capacity as Planning Director, County of Hawai'i
and COUNTY OF HAWAI'I

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This case came to the Intermediate Court of Appeals from the entry of Final Judgment filed on February 28, 2012 in favor of the CHRISTOPHER J. YUEN in his capacity as Planning Director, County of Hawai'i and COUNTY OF HAWAI'I (hereinafter collectively referred to as "County") on the County's Motion for Summary Judgment. Petitioner/Plaintiff-Appellant Mark C. Kellberg ("Petitioner"), in his current Application for Writ of Certiorari, offered no competent evidence either at the hearing on the Motion for Summary Judgment or in his brief to the Intermediate Court of Appeals showing an issue of material fact existed.

I. FACTS OF THE CASE

The facts of the case are concerned with a decision by the Planning Director to permit the subdivision of a parcel of land adjacent to Petitioner's property in Nīnole, County and State of Hawai'i. At issue is the decision by the Planning Director to honor the existence of six (6)

pre-existing lots as the grounds for subdividing the adjoining parcel. This is not, contrary to Petitioner's assertion, a question of zoning the adjacent parcel of land into lots less than 20 acres. Petitioner continues to fixate on the question of zoning when it was not an issue in the case.

This extended litigation, occurring since 2007, resulted in multiple motions with orders by different judges in the Circuit Court of the Third Circuit. Judge Hara, to whom this matter was first assigned, issued a number of rulings in this case including an October 15, 2010 ruling by Judge Hara finding Petitioner failed to exhaust his administrative remedies. It was then that Petitioner began to assert that the Third Circuit Court was not acting fairly in issuing its orders alleging bias and improper conduct on the part of Judge Hara. The case was eventually transferred to Judge Ronald Ibarra who issued the Final Judgment in this matter after the hearing on the County's Motion for Summary Judgment where a finding that no material issue of fact existed.

Final Subdivision approval was given in July of 2005 and Petitioner became aware of the final subdivision in August of 2005. At about the same time, an updated map revealed a separate non-contiguous lot meaning that seven (7) parcels were actually created rather than six. (This separate non-contiguous lot was later consolidated into a parcel adjoining the non-contiguous parcel, resulting in the elimination of the seventh lot.) Petitioner sought to challenge the then seven-lot subdivision. Petitioner wrote letters to the Planning Director on August 16, 2005, January 17, 2006 and then wrote a letter to the County of Hawai'i Board of Appeals ("BOA") on March 5, 2006.

The BOA responded to Petitioner's March 5, 2006 letter, referring him to the BOA Rules of Practice and Procedure which requires an appeal of the Planning Directors Decision be filed within thirty days after the decision of the Planning Director. After receiving the letter from the

BOA, Petitioner, through his attorney, sent additional letters to the Planning Director. On October 23, 2006, then Planning Director, Christopher Yuen, responded to Petitioner acknowledging a mistake in the subdivision approval. Petitioner was also advised that the Planning Director was, “not going to do anything to undo this situation at this time.” Petitioner, who was represented by counsel and having received information on the appeals process, chose not to file an appeal with the BOA even in light of his actual knowledge of the time limits in the appeals process.

Litigation commenced on May 11, 2007¹. Among the motions filed by the County was a Motion to Dismiss this case because Petitioner failed to exhaust his administrative remedies because he never appealed the final determination to the BOA that nothing would be done further relative to the subdivision approval. On September 30, 2008, this motion was denied by Judge Hara. On May 27, 2009, Petitioner filed a Motion for Partial Summary Judgment. On July 24, 2009, the court granted Petitioner’s Motion for Partial Summary Judgment which stated in part:

“Plaintiff should have been allowed to appeal the decision of October 23, 2006 ... but Plaintiff was denied such an opportunity to appeal.”

The Third Circuit Court remanded the case to the BOA and on September 15, 2009, Petitioner filed his General Petition for Appeal of Decisions by Planning Director to the BOA. The County filed its Motion to Dismiss this appeal for lack of jurisdiction which was granted by the BOA on February 18, 2010. On March 4, 2010, Petitioner filed a Motion for Partial Summary Judgment on Count V (Injunction) and for Injunction Against the County of Hawai‘i on his injunction claim. On October 15, 2010, this motion was denied by Judge Hara when the

¹ Petitioner tried to void the subdivision and disposes current owners of their property without naming them as parties to the suit. Petitioner’s Complaint did not name the owners of record of the property which was subdivided, when the complaint was filed.

Third Circuit Court concluded that the remand to the BOA rendered the injunction claim moot and that Petitioner had failed to exhaust his administrative remedies by failing to timely appeal the BOA's decision. The case was transferred to Judge Ibarra a short time later.

On April 21, 2011, the County then moved for summary judgment on all counts.

On June 16, 2011, Judge Ibarra granted the County's Motion for Summary Judgment and concluded that "the record reflects the absence of any genuine issue of material fact." Judge Hara recused himself earlier in the case.

The Intermediate Court of Appeal chose to decide this matter on the grounds of a failure to exhaust administrative remedies as asserted in the County's Motion for Summary Judgment. The County asserts that the Motion for Summary Judgment was properly granted by the trial court since Petitioner offered no evidence that a genuine issue of material fact existed as to any of the asserted grounds either in the trial court or in his brief to the Intermediate Court of Appeals.

The County's Motion for Summary Judgment asserted the following grounds:

- A. The County Acted Properly and in Accordance with the Hawai'i County Code.
- B. Plaintiff's Constitutional Claims are Without Merit.
- C. Plaintiff's "Abuse of Discretion/Violation of Statute" Cause of Action is Without Merit.
- D. Plaintiff Failed to Exhaust His Administrative Remedies.
- E. Plaintiff Has Failed to Join Necessary Parties and It Is Too Late To Do So.

As noted, Petitioner pointed to no specific facts in opposition to any of the grounds for the motion in the trial court or at the Intermediate Court of Appeals.

II. PETITIONER'S FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES

The Hawai'i County Code ("HCC") § 23-5 provides that:

Any person aggrieved by the decision of the director in the administration or application of this chapter, may, within thirty days after the director's decision, appeal the decision to the board of appeals. The board of appeals may affirm the decision of the director, or it may reverse, modify or remand the decision if the decision is:

- (a) In violation of this chapter or other applicable law; or
- (b) Clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
- (c) Arbitrary, or capricious, or characterized by an abuse of discretion or clearly unwarranted exercise of discretion.

Therefore, Petitioner had thirty days to file an appeal of the Planning Director's decision to recognize six pre-existing lots or grant final subdivision approval. However, Petitioner failed to file an appeal with the BOA until the Court ordered him to do so. Record on Appeal ("ROA") 2, pp. 103-104.

In *Sheehan v. Grove Farm Co., Inc.*, 114 Hawai'i 376, 390, 163 P.3d 179, 193 (2005), the Hawai'i Supreme Court stated:

The prerequisites to the exercise of jurisdiction ... are conditions which must be met by the party who seeks the exercise of jurisdiction in his favor. He must allege in his pleading the facts essential to show jurisdiction. If he fails to make the necessary allegations he has no standing. If he does make them, an inquiry into the existence of jurisdiction is obviously for the purpose of determining whether the facts support his allegations.... *As he is seeking relief subject to [the court's] supervision, it follows that he must carry throughout the litigation the burden of showing that he is properly in court. ... If his allegations of jurisdictional facts are challenged by his adversary in any appropriate manner, he must support them by competent proof.* (emphasis added).

Therefore, before the jurisdiction of the circuit court is invoked, a plaintiff is required to pursue available administrative remedies. Exhaustion of administrative remedies is required "where a claim is cognizable in the first instance by an administrative agency alone." *Kona Old Hawaiian Trails Group v. Lyman*, 69 Haw. 81, 93, 734 P.2d 161, 169 (1987), *see also, Pele Defense Fund v. Puna Geothermal Venture*, 9 Haw.App. 143, 151, 827 P.2d 1149, 1154 (1992)

(holding courts will not act unless party has taken advantage of all corrective procedures provided in administrative process).

In the present case, Petitioner failed to file with the BOA. The County raised this jurisdictional issue and as a result, the court ordered this case to the BOA. ROA 2, pp. 103-104.

The BOA conducted an evidentiary hearing and Findings of Fact, Conclusions of Law and Decision and Order was reached by the BOA. ROA 2, pp. 110-115. The BOA ruled against the Petitioner and **Petitioner failed to appeal the decision of the BOA.** Therefore, it is clear that despite being given a second bite of the apple, Petitioner deliberately failed to exhaust his administrative remedies.

Furthermore, the court has already ruled that it is unable to provide further relief as a result of Petitioner failing to exhaust his administrative remedies. The trial court stated, in part:

“Plaintiff’s failure to exhaust his administrative remedies forecloses this court from further action in this matter.”

ROA 2, pp. 106-108.

Therefore, Petitioner has failed to exhaust his administrative remedies and this Court cannot grant further relief. As a result, it is clear this Court is without jurisdiction and this case must be dismissed.

Petitioner asserts the case of *Hoku Lele, LLC v. City & County of Honolulu*, 129 Hawai`i 164, 296 P.3d 1072 (2013) provides support for his position. Quite the contrary, the Court of Appeals found that the letters sent by the Planning Director actively discouraged the Petitioner from appealing by stating his letters were not an appealable decision within the zoning board of appeals’ limited jurisdiction. This is not the case here.

The October 23, 2006 letter clearly stated no further action would be taken, thus a final order which in the ambit of the rules promulgated by the BOA constituted an appealable order.

The letter from the Planning Director in no way discouraged, denied or discussed the appealability of the decision to deny Petitioner's request. The Subdivision Code and the BOA Rules provide a broad and meaningful right to all persons aggrieved by a decision of the Planning Director.

Any concern that it would overwhelm the BOA with multiple appeals should not be a consideration by this Court. The BOA has jurisdictional limits which are constituted from the Hawai'i County Code and the BOA Rules.

III. CONCLUSION

Petitioner had actual knowledge of the appeal requirements and appeal process, he was represented by counsel and he made a deliberate choice not to appeal the denial of his request to undo the subdivision as evidenced by the October 23, 2006 letter.

Dated: Hilo, Hawai'i, October 2, 2013.

CHRISTOPHER J. YUEN in his capacity as
Planning Director, County of Hawai'i and
COUNTY OF HAWAI'I, Defendants-Appellees

By /s/ Michael J. Udovic
MICHAEL J. UDOVIC
Deputy Corporation Counsel
Their Attorney

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing document was served upon the following on the date and by the method of service noted below:

Served electronically through JEFS:

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Dated: Hilo, Hawai'i, October 2, 2013.

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