NO. SCAP-11-0000611

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

PAULETTE KA`ANOHIOKALANI KALEIKINI,

Plaintiff-Appellant,

vs.

WAYNE YOSHIOKA in his official capacity as Director of the City and County of Honolulu's Department of Transportation Services, CITY AND COUNTY OF HONOLULU, HONOLULU CITY COUNCIL, PETER CARLISLE in his official capacity as Mayor, CITY AND COUNTY OF HONOLULU DEPARTMENT OF TRANSPORTATION SERVICES, CITY AND COUNTY OF HONOLULU DEPARTMENT OF PLANNING AND PERMITTING, WILLIAM J. AILA, JR. in his official capacity as Chairperson of the Board of Land and Natural Resources and State Historic Preservation Officer, PUAALAOKALANI AIU in her official capacity as Administrator of the State Historic Preservation Division, BOARD OF LAND AND NATURAL

CIVIL NO. 11-1-0206-01 GWBC

APPEAL FROM:

(1) FINAL JUDGMENT FILED ON AUGUST 8, 2011

(2) JULY 5, 2011, ORDER GRANTING DEFENDANTS WAYNE YOSHIOKA IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE CITY AND COUNTY OF HONOLULU'S DEPARTMENT OF TRANSPORTATION SERVICES, CITY AND COUNTY OF HONOLULU, HONOLULU CITY COUNCIL, PETER CARLISLE IN HIS OFFICIAL CAPACITY AS MAYOR, CITY AND COUNTY OF HONOLULU DEPARTMENT OF PLANNING AND PERMITTING'S MOTION TO DISMISS COMPLAINT AND/OR FOR SUMMARY JUDGMENT FILED FEBRUARY 9, 2011

(3) JULY 5, 2011, ORDER GRANTING CERTAIN STATE DEFENDANTS' SUBSTANTIVE JOINDER IN DEFENDANTS WAYNE YOSHIOKA IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE CITY AND COUNTY OF HONOLULU'S DEPARTMENT OF

RESOURCES, DEPARTMENT OF LAND AND NATURAL RESOURCES, NEIL ABERCROMBIE in his official capacity as Governor, and O`AHU ISLAND BURIAL COUNCIL, Defendants-Appellees.	TRANSPORTATION SERVICES, CITY AND COUNTY OF HONOLULU, HONOLULU CITY COUNCIL, PETER CARLISLE IN HIS OFFICIAL CAPACITY AS MAYOR, CITY AND COUNTY OF HONOLULU DEPARTMENT OF PLANNING AND PERMITTING'S MOTION TO DISMISS COMPLAINT AND/OR FOR SUMMARY JUDGMENT FILED FEBRUARY 9, 2011 (4) JULY 5, 2011, ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION OF THE COURT'S RULING OF MARCH 23, 2011 CIRCUIT COURT OF THE FIRST CIRCUIT, STATE OF HAWAI'I HON. GARY W. B. CHANG

STATE DEFENDANTS-APPELLEES'[1] MEMORANDUM IN OPPOSITION TO PLAINTIFF-APPELLANT'S MOTION FOR INJUNCTIVE RELIEF PENDING APPEAL FILED MARCH 9, 2012

CERTIFICATE OF SERVICE

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[1] State Defendants-Appellees" or "State defendants" are WILLIAM J. AILA, JR., PUAALAOKALANI AIU, BOARD OF LAND AND NATURAL RESOURCES, DEPARTMENT OF LAND AND NATURAL RESOURCES, and NEIL ABERCROMBIE. The terms do not include O`AHU ISLAND BURIAL COUNCIL which has separate counsel.

NO. SCAP-11-0000611

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

PAULETTE KA`ANOHIOKALANI KALEIKINI, Plaintiff-Appellant, vs. WAYNE YOSHIOKA et al, Defendants-Appellees.	CIVIL NO. 11-1-0206-01 GWBC STATE DEFENDANTS-APPELLEES' MEMORANDUM IN OPPOSITION TO PLAINTIFF-APPELLANT'S MOTION FOR INJUNCTIVE RELIEF PENDING APPEAL FILED MARCH 9, 2012

STATE DEFENDANTS-APPELLEES' MEMORANDUM IN OPPOSITION TO PLAINTIFF-APPELLANT'S MOTION FOR INJUNCTIVE RELIEF PENDING APPEAL FILED MARCH 9, 2012

State defendants join City defendants' opposition to this motion and file this separate memorandum to make or emphasize two points.

First, the motion should be denied without prejudice because plaintiff has failed to comply with HRAP 8(a). That rule covers any motion for an "order suspending, modifying, restoring, or granting an injunction during the pendency of an appeal." It states that such a motion "shall ordinarily be made in the first instance to the court or agency appealed from" and

> if from a court, the motion shall show that application to the court appealed from for the relief sought is not practicable, or that the court appealed from has denied an application, or has failed to afford the relief the applicant requested, with the reasons given by the court appealed from for its action.

Emphasis added.

Plaintiff has ignored this rule. She did not apply for injunctive relief during the pendency of the appeal in the trial court. She does not explain (or even refer to) her failure to do so.

This requirement in HRAP 8(a) is not some mere technicality that a party may ignore at her pleasure. Rather it is "'[t]he cardinal principle of stay applications.' 16A Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, Federal Practice and Procedure § 3954 (3d ed. 1999)" quoted in *Baker v. Adams County/Ohio Valley School Bd.*, 310 F.3d 927, 930 (6th Cir. 2002). *See S.E.C. v. Dunlap*, 253 F.3d 768, 774 (4th Cir. 2001) (failure to pursue relief in the trial court "constitutes an omission we cannot properly ignore.").

Presumably, plaintiff will argue (belatedly in her reply) that the circuit court already denied her requested relief or has foreordained its ruling by granting summary judgment to defendants. This is not so. By definition, in any appeal the trial court has already addressed the merits of the case and made a determination as to the likelihood of success on the merits.

But that does not (and cannot) mean the trial court would automatically deny a motion for injunction during the pendency of an appeal and that appellants can always ignore HRAP 8(a). If so, the rule would be a nullity. On the contrary, it is clear that the trial court must in the first instance consider the possibility that his or her ruling might be wrong and put that in the balance with other relevant factors. If the trial court denies such a motion and appellant re-files in the appellate court, the appellate court can then make its determination with the benefit of the record on the motion, *In re Montes* , 677 F.2d 415, 416 (5th Cir. 1982), and with the benefit of the "reasons given by the court appealed from of its action." HRAP 8(a).

Nor does the fact that plaintiff asked for a preliminary injunction pending a final determination on the merits in the trial court excuse her from compliance. She did not ask the court below for an injunction during the pendency of the appeal which is what HRAP 8(a) requires. In this regard, HRCP 62(c) is also relevant. That rule specifically applies to such a case. It provides:

> **(c) Injunction Pending Appeal.** When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party.

Like HRAP 8(a), this rule would be a nullity if appellant can simply assume the trial court will always deny such a motion.

Furthermore, the trial court necessarily denied plaintiff's motion for a preliminary injunction. Such a motion requests relief while the case is pending in the trial court. Plaintiff's motion became moot once the court granted summary judgment. *See* order denying plaintiff's motion for preliminary injunction, R. 52 at 278:

> Therefore, having granted the City Defendants' motion and Certain State Defendants' Substantive Joinder, **IT IS HEREBY ORDERED, ADJUDGED AND DECREED** that Plaintiff's Motion for Preliminary Injunction, filed February 23, 2011, is **DENIED** as **MOOT**.

The trial court's denial of this motion does equate to an automatic denial of a motion for injunction during the pendency of the appeal. The trial court may recognize that there is some possibility it erred. The balance of harms may be considerably different.

Those considerations will not be persuasive in this case. Defendants are confident the trial court will deny a motion for injunction during the pendency of the appeal (as will this court if the application is properly renewed in this court). But the fact that plaintiff's motion has no merit – in any court - is no excuse to ignore HRCP 62(c) and HRAP 8(a).

Second, State defendants particularly want to emphasize that the balance of harms decisively favors defendants. Indeed it is an undisputed fact that plaintiff will <u>not</u> be harmed if the project proceeds as planned. The gravamen of plaintiff's complaint is that an AIS has not

been completed for phase 4 of the project in the Kaka‘ako area before ground disturbing construction activity commences there. But that AIS is scheduled to be completed by November 2012, years before ground disturbing activity starts in Kaka’ako in ***March 2015.***

Plaintiff’s lament that “the early preparation of an AIS” is needed “before options are closed and agency commitments are set in concrete” is just factually wrong. Furthermore, the basis for this alleged fear can only be that the Hawai‘i courts lack the power or will to stop the project if it proceeds during the appeal. One need look no further than the Superferry saga to realize that plaintiff’s lack of confidence in the courts is totally unfounded.

Plaintiff’s motion should be denied without prejudice pending a proper application to the trial court. In the alternative, the motion should be denied on the merits.

DATED: Honolulu, Hawai‘i, March 16, 2012.

/s/ William J. Wynhoff _____
Deputy Attorney General
Attorney for State defendants

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was duly served by the court on the following persons through electronic service on the date it was filed with the court:

Scott K. Bush
Don S. Kitaoka
David K. Frankel
Lindsay N. Mcaneeley
John P. Manuat
James C. Paige
Gary Y. Takeuchi
Robert Godbey Carson
Ashley K. Obrey

DATED: Honolulu, Hawai‘i, March 16, 2012.

/s/ William J. Wynhoff _____
Deputy Attorney General
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