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NO. 23221

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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E NOA CORPORATION, a corporation,  
Complainant-Appellant

vs.

ROBERT'S TOURS & TRANSPORTATION, INC., a corporation,  
Respondent-Appellee

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APPEAL FROM THE PUBLIC UTILITIES COMMISSION  
(DOCKET NO. 98-0202)

SUMMARY DISPOSITION ORDER

(By: Moon, C.J., Levinson, Nakayama,  
Acoba, and Duffy, JJ.)

Complainant-Appellant E Noa Corporation (E Noa) appeals from Order No. 17452 of the Public Utilities Commission of the State of Hawai'i (Commission or PUC) filed on January 6, 2000, dismissing E Noa's complaint, and Order No. 17529, filed on February 8, 2000, denying E Noa's motion for reconsideration. We vacate PUC Order Nos. 17452 and 17529, and remand the complaint to the PUC for a hearing pursuant to Hawai'i Revised Statutes (HRS) §§ 271-31 (1993),<sup>1</sup> 91-9(a) (1993), and 91-9(c) (1993)<sup>2</sup> for

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<sup>1</sup> HRS § 271-31 of the Motor Carrier Law provides in relevant part as follows:

**Hearings.** (a) All hearings, investigations, and proceedings shall be governed by this section and by rules of practice and procedure adopted by the public utilities commission, and in the conduct thereof, the technical rules of evidence need not be applied. No informality in any

(continued...)

the reasons stated herein.

On appeal, E Noa argues that the Commission did not apply the standard established for a motion to dismiss under Hawai'i Rules of Civil Procedure (HRCP) Rule 12(b)(6)<sup>3</sup> to the motion to dismiss filed under HAR § 6-61-9<sup>4</sup> by Respondent-

<sup>1</sup>(...continued)

hearing, investigation, or proceeding, or in the manner of taking testimony shall invalidate any order, decision or rule made, approved, or confirmed by the commission.

. . . .

(e) At the time fixed for any hearing before the commission or the time to which the hearing has been continued, the complainant and the person complained of, and such persons as the commission allows to intervene, shall be entitled to be heard and to introduce evidence. . . .

<sup>2</sup> HRS §§ 91-9(a) and 91-9(c) provide as follows:

**Contested cases; notice; hearing; records.** (a) In any contested case, all parties shall be afforded an opportunity for hearing after reasonable notice.

. . . .

(c) Opportunities shall be afforded all parties to present evidence and argument on all issues involved.

<sup>3</sup> Hawai'i Administrative Rules (HAR) § 6-61-1 provides that the purpose of the rules of practice and procedure before the Public Utilities Commission is as follows:

Purpose. These rules govern practice and procedure before the public utilities commission, State of Hawaii. They shall be liberally construed to secure the just, speedy, and inexpensive determination of every proceeding. Whenever this chapter is silent on a matter, the commission or hearings officer may refer to the Hawaii Rules of Civil Procedure for guidance.

(Emphasis added.)

<sup>4</sup> HAR § 6-61-9 states in pertinent part:

Motion to dismiss or to make more definite and certain. (a) . . . The respondent may also file a motion to dismiss a complaint because the complaint fails to state a claim upon which relief can be granted or for other valid reasons. If a motion to dismiss is filed before the answer, the commission shall set the date for filing the answer when it rules upon the motion.

(Emphases added.)

(continued...)

Appellee Robert's Tours & Transportation, Inc. (Robert's Tours), in that the Commission failed (1) to view E Noa's complaint in the light most favorable to E Noa and (2) to strictly limit its consideration of the motion to dismiss to the allegations in the complaint and to deem those allegations to be true.

Initially, Robert's Tours argues this claim is moot based on the authorization granted to Robert's Tours by the Commission on July 14, 1999 in Docket No. 96-0462, for permanent authority to operate as a common carrier over a regular route. However, although Robert's Tours received subsequent approval, that approval does not render the issue of Robert's Tours's prior violation moot. The operation of transportation for hire without the authorization of the PUC and outside the permitting process could be the basis of an alteration of subsequent permitting. Thus this case is not moot.<sup>5</sup>

In its complaint, E Noa contended that Robert's Tours was (1) utilizing trolley-type vehicles and providing "regular route" passenger transportation service without proper authority from the Commission, in violation of HRS §§ 271-8 (1993)<sup>6</sup> and

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<sup>4</sup>(...continued)

<sup>5</sup> Robert's Tours points out that the dispute at issue relates only to that limited period from the time E Noa filed the complaint herein on July 24, 1998 until the Commission granted Robert's Tours regular route authority on July 14, 1999, a period of less than a year. E Noa does not dispute this.

<sup>6</sup> HRS § 271-8 states:

**Certificate or permit required.** Except as provided in section 271-5, no person shall engage in the transportation  
(continued...)

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271-12(a) (1993),<sup>7</sup> (2) advertising, in violation of HRS § 271-8.5(a) (1993),<sup>8</sup> and (3) seeking to evade or defeat the Commissions's regulations, in violation of HRS § 271-27(b) (Supp. 2003). On September 22, 1998, Robert's Tours filed a response and a motion to dismiss E Noa's complaint.

A HAR § 6-61-9 motion to dismiss is couched in part in language like that of HRCP Rule 12(b)(6).<sup>9</sup> HRCP Rule 12(b)(6) provides for dismissal of a complaint for "failure to state a

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<sup>6</sup>(...continued)

of persons or property, for compensation or hire, by motor vehicle, over any public highway of this State unless there is in force with respect to the person a certificate or permit issued by the public utilities commission authorizing the transportation.

<sup>7</sup> HRS § 271-12(a) provides:

**Applications for certificates of public convenience and necessity.** (a) Except as otherwise provided in this section and in section 271-16, no person shall engage in the business of a common carrier by motor vehicle on any public highway in this State, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the public utilities commission authorizing such operation.

<sup>8</sup> HRS § 271-8.5(a) entitled "Advertising," instructs that

[i]t shall be a misdemeanor for any person, including a person who is exempt under section 271-5, to advertise as a motor carrier of passengers or property, unless the person holds a valid certificate or permit required by this chapter as to the classification so advertised. The term "advertise", as used in this section, includes: the issuance of any card, sign, or device to any person, or the causing, permitting, or allowing of any sign or marking on or in any building or motor vehicle, or the advertising in any newspaper, magazine, or advertising other than in-column listings in any directory, or the commercial broadcasting by airwave transmission.

<sup>9</sup> E Noa applies HRCP standards in its arguments, and Robert's Tours does not contest this approach.

claim upon which relief can be granted.”<sup>10</sup> Applying HRCP Rule 12(b)(6) in reviewing Robert’s Tours’s motion to dismiss, E Noa’s allegations in its complaint must be “accept[ed] as true and construe[d] in the light most favorable to” E Noa. Bremner v. City & County of Honolulu, 96 Hawai’i 134, 138-39, 28 P.3d 350, 354-55 (App. 2001). Also, it is well settled that “[a] complaint should not be dismissed . . . unless it appears beyond a 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.” Touchette v. Ganai, 82 Hawai’i 293, 298, 922 P.2d 347, 352 (1996); see also Moore v. Allstate Ins. Co., 6 Haw. App. 646, 648, 736 P.2d 73, 76 (1987).

In its Order No. 17452, the Commission stated that a “regular route service . . . has multiple scheduled stops all along a fixed route, where passengers are expected to disembark and reboard at their convenience.” Robert’s Tours does not contest that it was only authorized to operate an irregular route service, designed to transport passengers between hotels in Waikīkī and the Hilo Hattie store. Instead, Robert’s Tours

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<sup>10</sup> HRCP Rule 12(b)(6) provides as follows:

**Rule 12. Defenses and objections--When and how presented--By pleading or motion--Motion for judgment on the pleadings.**

. . . .  
**(b) How Presented.** Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . (6) failure to state a claim upon which relief can be granted[.] . . .

maintains that its service "does not make scheduled stops at Dole Cannery, Aloha Tower Marketplace, Ala Moana Shopping Center and the Hilo Hattie Store," and that its operations were a proper exercise of its irregular route service. However, E Noa's assertion in its complaint that "Robert's Tours' [s] vehicles [we]re operating daily, and [we]re stopping, at scheduled times, at . . . Dole Cannery, Aloha Tower Marketplace, Ala Moana Shopping Center, and the Hilo Hattie Store . . . on a premeditated basis, not on an on-call basis[,]" must be viewed as true. (Emphases added.)

If Robert's Tours was in fact stopping at scheduled times at Dole Cannery, Aloha Tower Marketplace, Ala Moana Shopping Center, and the Hilo Hattie Store, and not on an on-call basis, this would not be a "proper exercise of [Robert's Tours's] irregular route authority." If E Noa's allegations are accepted as true, E Noa's complaint that Robert's Tours was operating beyond the scope of its regular route authority would "entitle [E Noa] to relief." Touchette, 82 Hawai'i at 298, 922 P.2d at 352. Similarly, under HAR § 6-61-9(a), if Robert's Tours were operating a regular route service without authorization, this would be a "claim upon which relief can be granted."

Aside from the language of HAR § 6-61-9(a), the Commission did not mention the HRCP and the standards thereunder in deciding the Commission's proceedings.<sup>11</sup> In any event, under

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<sup>11</sup> HAR § 6-61-1 provides that the PUC "may refer to the [HRCP] for guidance." Hence, HRCP Rule 12(b) does not apply unless the PUC chooses to (continued...)

HAR § 6-61-9(a), the complaint and answer on their faces indicated disputed issues of material fact bearing upon the rights and liabilities of the carriers. Thus, any conflict in allegations of material facts should be resolved by a hearing. See Shoreline Trans. v. Robert's Tours & Transp., 70 Haw. 585, 594-95, 779 P.2d 868, 873-74 (1989) (explaining that Shoreline's complaint alleging that Robert's Tours had been operating an illegal regular route scheduled bus service without proper authorization from the Commission "entailed a determination of past and present rights and liabilities of the two carriers" requiring a "contested case" hearing within the meaning of HRS § 91-1(5)).

Therefore, in accordance with Hawai'i Rules of Appellate Procedure Rule 35, and after carefully reviewing the record and the briefs submitted by the parties, and duly considering and analyzing the law relevant to the arguments and issues raised by the parties,

IT IS HEREBY ORDERED that the Commission's Order No. 17452, filed on January 6, 2000, dismissing E Noa's complaint, and Order No. 17529, filed on February 8, 2000, denying E Noa's motion for reconsideration, are vacated, and E Noa's complaint is

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<sup>11</sup>(...continued)  
use it for "guidance." Neither the parties nor the commission's order indicates that summary judgment was moved or applied for. However, in the absence of a genuine issue of material fact, the PUC is not precluded from considering the use of summary judgment. (See Shoreline Transp., Inc. v. Robert's Tours and Transp., Inc., 70 Haw. 585, 588, 779 P.2d 868, 870 (1989) (explaining that additional documents were attached to the pleadings and the PUC "treated the motions to dismiss as pleas for summary judgment").

remanded for a hearing pursuant to HRS §§ 271-31, 91-9(a), and 91-9(c).

DATED: Honolulu, Hawai'i, February 6, 2004.

On the briefs:

Sandra J. Hoshida & Shah J.  
Bento (Hoshida Bento &  
Matsunaga) for complainant-  
appellant.

Arthur S.K. Fong for  
respondent-appellee.