

NO. 24085

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

---

LIANG-CHENG JIN, Plaintiff-Appellee,

vs.

JAMES M. BROCK, Defendant-Appellant.

---

APPEAL FROM THE FIRST CIRCUIT COURT  
(CVI. NO. 99-4298)

SUMMARY DISPOSITION ORDER

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

Defendant-appellant James M. Brock appeals from the first circuit court's<sup>1</sup> (1) January 10, 2001 order denying his motion for summary judgment and motion to vacate default judgment, and (2) March 15, 2001 findings of fact (FOF), conclusions of law (COL), and order denying his motion for reconsideration of the January 10, 2001 order. Brock essentially contends that the circuit court erred by: (1) ruling that it had personal jurisdiction over him by service by publication; (2) failing to set aside default judgment; and (3) ruling that venue in Hawai'i was proper.

Upon carefully reviewing the record and the briefs submitted and having given due consideration to the arguments

---

<sup>1</sup> The Honorable R. Mark Browning presided over matters relating to Brock's motion for summary judgment and motion to vacate default judgment. The Honorable Karen Blondin presided over matters relating to service of process.

advanced and the issues raised by the parties, we resolve Brock's contentions as follows. (1) In arguing the sufficiency of service by certified mail and the propriety of service by publication, Brock erroneously cites the criteria set forth in HRS §§ 634-23(2) and 634-24 (1993),<sup>2</sup> which pertain to in rem

---

<sup>2</sup> HRS § 634-23(2) states:

**Joinder of unknown persons; service when defendant unknown or absent.** Where an action or proceeding involves or concerns any property, tangible or intangible, within the jurisdiction of a circuit court, or any legal or equitable estate, right or interest, vested or contingent, in any such property, or any status or res within the jurisdiction of a circuit court:

(2) If a defendant is unknown or does not reside within the State or if, after due diligence, the defendant cannot be served with process within the State, and the facts shall appear by affidavit to the satisfaction of the court, it may order that service be made as provided by section 634-24 or by publication, as may be appropriate; provided that service by publication shall not be valid unless, it is shown to the satisfaction of the court that service cannot be made as provided by section 634-24. The affidavit required by this paragraph shall set forth facts based upon the personal knowledge of the affiant concerning the methods, means, and attempts made to locate and effect personal service on the defendant and any other pertinent facts.

(Emphases added.) Pursuant to HRS § 634-24:

**Service outside the State or by registered mail.**

In any case in which, under section 634-23, provision is made for service of summons as provided by this section, personal service shall be made upon the defendant wherever found or the defendant shall be served by registered or certified mail with request for a return receipt and marked deliver to addressee only, as ordered by the court. A certified copy of the order, the summons and the complaint shall be served, and the service shall be evidenced by an affidavit showing that the required papers were sent by registered or certified mail as aforesaid, and by the receipt signed by the defendant and filed with the affidavit, or in the case of personal service by the return of the serving officer or the affidavit of any other person authorized to serve process in the place where the defendant is found or appointed by the court to make the service.

The affidavit required by this section shall set forth facts based upon the personal knowledge of the affiant concerning the methods, means, and attempts made to satisfy the requirements of this section and any other pertinent facts.

(continued...)

jurisdiction rather than personal jurisdiction. However, even addressing Brock's contention with reference to the appropriate statutory provisions, we hold that, based on the record, the circuit court did not err in ordering service by certified mail and, thereafter, service by publication. HRS §§ 634-35 and 634-36 (1993).<sup>3</sup> As the circuit court found in FOF 7 of its March

---

<sup>2</sup> (...continued)  
(Emphasis added.)

<sup>3</sup> Pursuant to HRS § 634-35:

**Acts submitting to jurisdiction.**

(a) Any person, whether or not a citizen or resident of this State, who in person or through an agent does any of the acts hereinafter enumerated, thereby submits such person, and, if an individual, the person's personal representative, to the jurisdiction of the courts of this State as to any cause of action arising from the doing of any of the acts:

- (1) The transaction of any business within this State;
- (2) The commission of a tortious act within this State;
- (3) The ownership, use, or possession of any real estate situated in this State;
- (4) Contracting to insure any person, property, or risk located within this State at the time of contracting.

(b) Service of process upon any person who is subject to the jurisdiction of the courts of this State, as provided in this section, may be made as provided by section 634-36, if the person cannot be found in the State, with the same force and effect as though summons had been personally served within this State.

(c) Only causes of action arising from acts enumerated herein may be asserted against a defendant in an action in which jurisdiction over the defendant is based upon this section.

(d) Nothing herein contained limits or affects the right to serve any process in any other manner now or hereafter provided by law.

(Emphases added.)

HRS § 634-36 provides in pertinent part that:

**Manner of service under sections 634-33 to 35.**

When service of summons is provided for by section 634-33, 634-34, or 634-35, service shall be made by service upon the defendant personally by any person authorized to serve process in the place in which the defendant may be

(continued...)

15, 2001 order, “[a]t the time the Complaint was filed, the address for [Brock] was 775 Kinalau Place, Apartment No. 1206, Honolulu, Hawaii 96813 as verified through postal inquiry.” Brock fails to adduce any evidence to show that this FOF is clearly erroneous. Association of Apartment Owners of Wailea Elua v. Wailea Resort Co., Ltd., 100 Hawai’i 97, 112, 58 P.3d 608, 623 (2002). Moreover, the record reflects that, at the time plaintiff-appellant Liang-Cheng Jin requested an order for service by publication, he was only aware of Brock’s Kinalau address. Therefore, inasmuch as service of process was “reasonably calculated, under all the circumstances, to apprise [Brock] of the pendency of the action and afford [him] an opportunity to present [his] objections[,]” Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950), the circuit court did not err by ordering service by publication under HRS § 634-36.

---

<sup>3</sup>(...continued)

found or appointed by the court for the purpose, or sent by certified, registered, or express mail, postage prepaid, with return receipt requested, by the plaintiff or the plaintiff’s attorney to the defendant. . . .

If the defendant cannot be found to serve or mail the summons and the facts shall appear by affidavit or otherwise to the satisfaction of the court, it may order that service be made by publication of summons in at least one newspaper published in the State and having a general circulation in the circuit in which the action has been instituted, in such manner and for such time as the court may order, but not less than once each week in four successive weeks, the last publication to be not less than twenty-one days prior to the return date stated therein unless a different time is prescribed by order of the court.

(Emphases added.)

(2) We hold that, inasmuch as Brock fails to establish a meritorious defense, the circuit court did not err in denying his motion to set aside default judgment under BDM, Inc. v. Sageco, Inc., 57 Haw. 73, 77, 549 P.2d 1147, 1150 (1976). See Territory of Hawai'i v. Kapiolani Estate, Ltd., 20 Haw. 548 (1911) (trial court did not abuse its discretion in refusing to reopen a default where affidavits in support of motion to set aside default asserted that defendant had a full and complete defense to action on the merits but facts constituting alleged defense were not shown); Hawai'i Rules of Civil Procedure Rule 9(b) (2000); Larsen v. Pacesetter Systems, Inc., 74 Haw. 1, 30-31, 837 P.2d 1273, 1288, amended in part on other grounds, 74 Haw. 650, 843 P.2d 144 (1992).

(3) In arguing that the circuit court erred in ruling that venue in Hawai'i was proper, Brock erroneously equates residence with domicile. State v. Archuletta, 85 Hawai'i 512, 514, 946 P.2d 620, 622 (App. 1997) ("'Residence' is not synonymous with 'domicile,' though the two terms are closely related; a person may have only one legal domicile at one time, but he may have more than one residence." (citations and internal quotation marks omitted) (emphasis added)). Only in his reply brief does Brock claim for the first time to be "a permanent resident domiciled in Beijing, China[.]" We hold, therefore, that Brock has waived the issue of domicile. Pele Defense Fund v. Paty, 73 Haw. 578, 613, 837 P.2d 1247, 1268

(1992); see Hawai'i Rules of Appellate Procedure (HRAP) Rule 28(b)(4) (2000); HRAP Rule 28(b)(7) (2000). Regardless, there is sufficient evidence in the record to show that Brock was domiciled in Hawai'i prior to allegedly permanently relocating to China. See Arakaki v. Arakaki, 54 Haw. 60, 62, 502 P.2d 380, 382 (1972). Inasmuch as Brock fails to meet his burden of showing that he acquired a new domicile in Beijing, China, Arakaki, 54 Haw. at 62, 502 P.2d at 382 ("A domicile once established is presumed to continue and one alleging that a change has taken place has the burden of proof."), we hold that venue in the first circuit court is proper under HRS § 603-36(5) (2000). Therefore,

IT IS HEREBY ORDERED that the circuit court's

(1) January 10, 2001 order denying Brock's motion for summary judgment and motion to vacate default judgment and (2) March 15, 2001 FOF, COL, and order denying Brock's motion for reconsideration of the January 10, 2001 order are affirmed.

DATED: Honolulu, Hawai'i, February 26, 2004.

On the briefs:

Roger C. Lerud,  
for defendant-appellant

Adrian W. Rosehill and  
Alan J. Ma, for  
plaintiff-appellee