NOT FOR PUBLICATION

NO. 24170

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAI'I

THOMAS A. CRAIG, Plaintiff-Appellant, v.
COUNTY OF MAUI, DEPARTMENT OF WATER SUPPLY,
Defendant-Appellee

APPEAL FROM THE CIRCUIT COURT OF THE SECOND CIRCUIT
(CIV. NO. 98-0479(3))

SUMMARY DISPOSITION ORDER

(By: Burns, C.J., Watanabe and Lim, JJ.)

Plaintiff-Appellant Thomas Allen Craig (Craig) appeals the February 21, 2001 amended judgment entered by the circuit court of the second circuit[1] in favor of Defendant-Appellee County of Maui, Department of Water Supply (DWS), that granted DWS's June 2, 2000 motion for summary judgment on Craig's June 15, 1998 employment discrimination complaint, as amended on March 31, 1999.

Upon a painstaking review of the record and the briefs submitted by the parties, and giving sedulous consideration to the arguments advanced and the issues raised by the parties, we resolve Craig's points of error on appeal as follows:

1. Craig contends the court erred in not considering the supplemental declaration in opposition to DWS's motion for summary judgment that he filed six minutes before the hearing on

[1] The Honorable Joseph E. Cardoza, judge presiding.

the motion. We disagree. Basic fairness, and Rule 7(b) of the Rules of the Circuit Courts of the State of Hawai‘i (RCCSH),[2] clearly hold to the contrary, and all of Craig's arguments in excuse or mitigation of his late filing lack merit because the document could have and should have been filed with his memorandum in opposition to DWS's motion.[3] Craig claims, however, that he was "taken by surprise with the specific assertion made for the first time in [DWS's reply memorandum in support of its motion for summary judgment] that [Craig's Hawai‘i Civil Rights Commission (HCRC)] complaint was not timely filed." See RCCSH Rule 7(b). Craig thereupon urges that the court erred in not striking that part of DWS's reply memorandum or allowing him to respond (presumably, by admitting his supplemental

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[2] Rule 7(b) of the Rules of the Circuit Courts of the State of Hawai‘i provides:

> [A party opposing a motion] may serve and file counter affidavits and a memorandum in opposition to the motion, which shall be served and filed not less than 8 days before the date set for the hearing, except as otherwise provided by the Hawai‘i Rules of Civil Procedure or ordered by the court. The movant may file and serve a reply not less than 3 days before the date set for the hearing. A reply must respond only to arguments raised in the opposition. Unless permitted by another rule or statute, no party may file or serve any papers other than those provided for in this rule. No party may file any papers less than 3 days before the date set for the hearing unless otherwise ordered by the court.

(Emphases supplied.)

[3] Accordingly, we do not reach Plaintiff-Appellant Thomas Allen Craig's alternative points that the court erred in refusing to admit his supplemental declaration because it was not an affidavit and contained hearsay.

declaration). We disagree. DWS's motion for summary judgment and the memorandum in support thereof clearly raised the bar of Hawaii Revised Statutes (HRS) § 368-11(c) (1993).[4]

2. Craig complains that the court erred in denying his requests for a Hawai'i Rules of Civil Procedure (HRCP) Rule 56(f)[5] continuance. On this point, Craig, in his opening brief, merely quotes HRCP Rule 56(f) and states that, "because summary judgment is such a drastic outcome for the plaintiff," a continuance should have been afforded him "to fully oppose the motion so that all available evidence and the inferences to be drawn therefrom can be viewed in the light most favorable to plaintiff." This is a wholly conclusory argument and

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[4] Hawaii Revised Statutes (HRS) § 368-11(c)(1993) provides:

> (c) No complaint [to the Hawai'i Civil Rights Commission of an alleged unlawful discriminatory practice] shall be filed after the expiration of one hundred eighty days after the date:
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> (1) Upon which the alleged unlawful discriminatory practice occurred; or
>
> (2) Of the last occurrence in a pattern of ongoing discriminatory practice.

A timely HRS § 368-11(c) complaint is a prerequisite to the filing of a civil action concerning the alleged unlawful discriminatory practice. HRS § 368-12 (1993).

[5] Hawai'i Rules of Civil Procedure (HRCP) Rule 56(f) provides:

> Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

insufficient. Ala Moana Boat Owners' Ass'n v. State, 50 Haw. 156, 158, 434 P.2d 516, 518 (1967). In his reply brief, Craig points to the fact that he had fired his allegedly incompetent original counsel and substituted new counsel fifteen days before the hearing originally scheduled on DWS's motion for summary judgment, and thus needed the continuance to adequately oppose the motion. This was merely an exigency of Craig's own making and likewise insufficient. Below, Craig had argued that he needed the continuance because he might amend his complaint to add allegations relating to his "recent" third termination from DWS employment on January 31, 2000. But five months is not "recent" in this respect, and an amendment interposed as "a vehicle to circumvent summary judgment[,]" is something we do not condone. Fed. Home Loan Mortgage Corp. v. Tranamerica Ins. Co., 89 Hawai'i 157, 162, 969 P.2d 1275, 1280 (1998) (citations and internal quotation marks omitted). The court did not err in denying Craig's requests for a HRCP Rule 56(f) continuance.

3. Craig argues that the court erred in granting summary judgment based on his untimely HCRC complaint because the doctrines of "continuing violation" and "equitable tolling" applied. The applicability *vel non* of the two doctrines to one side, Craig clearly stated in his memorandum in opposition to DWS's motion that the unlawful discriminatory practices DWS allegedly perpetrated upon him "culminated with his being

terminated from the Water Treatment Plants Supervisor Position on February 13, 1996" (citation to the record omitted). This termination was, Craig acknowledged, "the subject of his HCRC complaint," and "'the last occurrence in a pattern of ongoing discriminatory practice'" (quoting HRS § 368-11(c)(2)). Hence, but on the mistaken impression that he had filed his HCRC complaint on August 12, 1996, Craig concluded that his HCRC complaint was timely filed, and that HRS §§ 368-11(c) and -12[6] allowed him to maintain this civil action: "There is no dispute that Craig's February 13, 1996 termination is within the statutory 180-day limitations period for his August 12, 1996, HCRC/EEOC filing." Indeed, at the July 5, 2000 hearing on DWS's motion for summary judgment, Craig's counsel initially asked the court "that [DWS] be held to the date of February 13th." When the court pointed out that the filing date of Craig's HCRC complaint was August 15, 1996, and not August 12, 1996 as Craig had written in his memorandum in opposition, Craig's counsel responded, "That was a mistake. You're correct." And when the court asked Craig's counsel to specify "what facts in the pleadings before the Court establish a continuing violation[,]" Craig's counsel could specify and locate none. Upon these confirmations by Craig, the court granted DWS's motion for summary judgment. In doing so, the court did not err, and the

[6] See footnote 4, supra.

doctrine of "continuing violation" did not apply. HRCP Rule 56(c).[7] The doctrine of "equitable tolling" was, simply, not properly raised and supported below. See Kawamata Farms, Inc. v. United Agri Prods., 86 Hawai'i 214, 248, 948 P.2d 1055, 1089 (1997) ("The general rule is that an issue which was not raised in the lower court will not be considered on appeal." (citations and internal quotation marks omitted)).

4. Craig raises several issues regarding the $107,460.00 in attorneys' fees the court awarded to DWS as sanctions against him for a frivolous lawsuit.[8] We note at the outset, however, that Craig's notice of appeal designated, and we quote, only the "'Amended Judgment on Motion for Summary Judgment', entered in the Second Circuit Court on February 21,

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[7] HRCP Rule 56(c) provides, in pertinent part, that "[t]he [summary] judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

[8] HRS § 607-14.5 (Supp. 2002) provides, in relevant part:

> (a) In any civil action in this State where a party seeks money damages or injunctive relief, or both, against another party, and the case is subsequently decided, the court may, as it deems just, assess against either party, whether or not the party was a prevailing party, and enter as part of its order, for which execution may issue, a reasonable sum for attorneys' fees and costs, in an amount to be determined by the court upon a specific finding that all or a portion of the party's claim or defense was frivolous as provided in subsection (b).
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> (b) In determining the award of attorneys' fees and costs and the amounts to be awarded, the court must find in writing that all or a portion of the claims or defenses made by the party are frivolous and are not reasonably supported by the facts and the law in the civil action[.]

2001," and failed to designate the court's separate judgments on attorneys' fees and costs, respectively.

> [Hawai'i Rules of Appellate Procedure] Rule 3(c) states that a notice of appeal "shall designate the judgment, order or part thereof appealed from." See Chun v. Board of Trs. of Employees' Ret. Sys. of the State of Hawai'i, 92 Hawai'i 432, 448, 992 P.2d 127, 143 (2000) (ruling that because the appellants "did not, in . . . their notices of appeal, designate the . . . order as an order from which an appeal was being taken, they have not properly appealed it"). However, "'a mistake in designating the judgment . . . should not result in loss of the appeal as long as the intention to appeal from a specific judgment can be fairly inferred from the notice and the appellee is not misled by the mistake.'" State v. Graybeard, 93 Hawai'i 513, 516, 6 P.3d 385, 388 (App. 2000) (quoting City & County of Honolulu v. Midkiff, 57 Haw. 273, 275-76, 554 P.2d 233, 235 (1976) (quoting 9 Moore's Federal Practice § 203.18 (1975))); see also Midkiff, 57 Haw. at 276, 554 P.2d at 235 (stating that a notice of appeal "fairly infers an intent to appeal from [a] composite of orders" and "[t]here is no showing of any misleading of the other parties to their detriment" and thus concluding that a notice was sufficient in form (citing Yoshizaki v. Hilo Hosp., 50 Haw. 1, 2, 427 P.2d 845, 846, reh'g granted, 50 Haw. 40, 429 P.2d 829, rev'd on other grounds, 50 Haw. 150, 433 P.2d 220 (1967); Credit Assocs. v. Montilliano, 51 Haw. 325, 328, 460 P.2d 762, 764 (1969)).

Ek v. Boggs, No. 22798, slip op. at 8-9 (Haw. August 29, 2003) (brackets and ellipses in the original). Although there is grave doubt whether Craig's intention to appeal the sanctions can be fairly inferred from his notice of appeal, DWS was clearly not misled by the mistake, id., because it met Craig's points regarding the sanctions in its answering brief.

At any rate, Craig's points in this regard are devoid of merit. Craig avers that the court erred in awarding DWS sanctions against him for a frivolous lawsuit because the statute of limitations problem was not clear and obvious. We disagree. It was both. Craig also asserts that DWS failed to "mitigate"

its attorneys' fees because it failed to move for summary judgment based on the statute of limitations immediately after he filed his complaint. This assertion is without merit. The record reveals that, throughout the course of this litigation, Craig consistently failed, refused or was unable to define the particulars and scope of his claims against DWS. Two successful motions to compel discovery and for sanctions filed by DWS, with another pending at the time of summary judgment, along with a stipulated DWS motion for more definite statement, are emblematic of the insistent vagueness of Craig's claims. DWS did not "run up the bill." Craig complains that DWS's counsel "reconstructed" some of his time entries from memory, and that DWS's counsel neglected to record some of his time spent on the case and the time previous counsel spent on the case. The latter two circumstances are nugatory, as DWS's counsel did not submit that time spent to the court in connection with DWS's motion for sanctions. The former circumstance is unexceptionable, for Craig cites no law disqualifying "reconstructed" time entries from consideration, and makes no cognizable argument that such time entries were unreliable in this case. Craig also argues that the court's attorneys' fees sanction should have been limited to the salaries of DWS's counsel and staff for the proportion of their work time spent on the case, and should also have been delimited by Craig's ability to pay. We find no such principles in HRS §

607-14.5 (Supp. 2002), only that the attorneys' fees awarded be in "a reasonable sum[.]" Upon a survey of the seven volumes of court files generated in this case, covering virtually every incident and facet of Craig's employment with DWS he found objectionable, from his start in 1984 to the time of summary judgment, we conclude that the attorneys' fees the court awarded as a sanction for this frivolous lawsuit were, indeed, "a reasonable sum[.]" Id.

Therefore,

IT IS HEREBY ORDERED that the court's February 21, 2001 amended judgment on motion for summary judgment, the court's December 5, 2000 judgment awarding attorneys' fees as a sanction, and the court's October 2, 2000 judgment on bill of costs and order, are affirmed.

DATED: Honolulu, Hawai‘i, September 12, 2003.

On the briefs:

James H. Fosbinder and
Rhonda Mary Fosbinder,
for plaintiff-appellant.

Chief Judge

Blaine T. Kobayashi,
Deputy Corporation Counsel,
County of Maui,
for defendant-appellee.

Associate Judge

Associate Judge