

NO. 27469

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

ERLINDA DOMINGUEZ, dba LAW OFFICES OF ERLINDA
DOMINGUEZ, Plaintiff-Appellant,

v.

FRANCIS T. O'BRIEN, dba FRANCIS T. O'BRIEN,
Attorney at Law, Defendant-Appellee,

and

JOHN DOES 1-10; JANE DOES 1-10; DOE CORPORATIONS
1-10; and DOE PARTNERSHIPS 1-10, Defendants

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CIVIL NO. 05-1-0339)

SUMMARY DISPOSITION ORDER

(By: Burns, C.J., Foley and Nakamura, JJ.)

Plaintiff-Appellant Erlinda Dominguez, dba Law Offices of Erlinda Dominguez, (Dominguez) appeals from the Final Judgment filed on August 15, 2005 in the Circuit Court of the First Circuit (circuit court).^{1/} The circuit court granted summary judgment in favor of Defendant-Appellee Francis T. O'Brien,^{2/} dba Francis T. O'Brien, Attorney-at-law, (O'Brien) and against

^{1/} The Honorable Sabrina McKenna presided.

^{2/} Plaintiff-Appellant Erlinda Dominguez's Opening Brief and Defendant-Appellee Francis T. O'Brien's answering brief fail to comply with Hawai'i Rules of Appellate Procedure Rule 28(b)(3) in failing to include in the statement and counterstatement, respectively, of the case specific record references for each and every statement of fact or mention of court proceedings. Appellant and Appellee are warned that future non-compliance with HRAP 28 may result in sanctions.

FILED
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E. M. RINANDO
CLERK, APPELLATE COURTS
STATE OF HAWAII

Dominguez on all claims asserted in Dominguez's March 1, 2005 Complaint and March 17, 2005 First Amended Complaint.

On appeal, Dominguez raises three points of error:

(1) The circuit court "erred in dismissing [Dominguez's] claims in Count I (declarations as to the Japan lawsuit lack of translation) as a 'matter of law,' where the Court apparently concluded in a Motion for Summary Judgment the following: That res judicata and collateral estoppel bar [Dominguez]; that there is no 'independent cause of action against [O'Brien]' [the attorney representing clients] outside of the underlying malpractice case; that [Dominguez] could not prove the 'but for' or the 'proximate causation' between the false declarations and the Order of the court denying [Dominguez's] Motion for Summary Judgment in the malpractice case; and that there is no material factual issue for the Jury to decide, and the Court's rulings were based on [O'Brien's] unauthenticated records from another forum."

(2) The circuit court "erred in dismissing, 'as a matter of law' [Dominguez's] claims in Count [II^{3/}] with regard to 'defamation' and 'abuse of process' leaving only the claim for 'fraud' (regarding the Ex-Parte Garnishee Summons/Orders)."

^{3/} Although Dominguez's brief refers to this as Count "11," this order will refer to it as Count "II."

(3) The circuit court "erred in dismissing the remaining claim of 'fraud' in Count [II] in [O'Brien's] second Motion for Summary Judgment."

Upon careful review of the record and the briefs submitted by the parties and having given due consideration to the arguments advanced and the issues as raised by the parties, we hold:

(1) The circuit court did not err when it granted summary judgment in favor of O'Brien on Count I because Count I was an improper collateral attack on a judgment, which was not obtained by means of fraud, reached in a separate matter. "A collateral attack is an attempt to impeach a judgment or decree in a proceeding not instituted for the express purpose of annulling, correcting or modifying such judgment or decree." Kapiolani Estate, Ltd. v. Atcherly, 14 Haw. 651, 661 (1903) (internal quotation marks and citation omitted). "As a general rule, a collateral attack may not be made upon a judgment or order rendered by a court of competent jurisdiction. If it is only a question of error or irregularity and not of jurisdiction, it cannot be raised on collateral attack." State v. Grindling, 96 Hawai'i 402, 405, 31 P.3d 915, 918 (2001) (quoting First Hawaiian Bank v. Weeks, 70 Haw. 392, 398, 772 P.2d 1187, 1191 (1989)). Dominguez's argument falls within this rule and is therefore improper.

(2) The circuit court did not err when it granted summary judgment in favor of O'Brien on Count II because O'Brien committed no abuse of process, fraud, or defamation. Dominguez asserts that O'Brien abused the garnishment process when attempting to collect on the judgment against Dominguez by sending out garnishee summonses to dozens of financial institutions that had no business dealings with Dominguez, thus causing her great embarrassment. O'Brien responds that his actions were all legitimate and appropriate under the circumstances and are widely-accepted practices in judgment collection proceedings.

"The tort of abuse of process has as its essential elements (1) an ulterior purpose and (2) a wilful act in the use of the process which is not proper in the regular conduct of the proceeding." Wong v. Panis, 7 Haw. App. 414, 420, 772 P.2d 695, 699-700 (1989). "For abuse of process to occur there must be use of the process for an immediate purpose other than that for which it was designed and intended." Id. at 421, 772 P.2d at 700 (quoting Restatement (Second) of Torts § 682, comment b (1977)).

Dominguez offered no evidence in support of her claim that O'Brien had an ulterior purpose in undertaking the garnishment proceedings as he did. Nor did she offer any evidence that O'Brien acted in any way uncommon to the practice of collecting unpaid judgments.

The circuit court did not err in granting summary judgment on Count II inasmuch as that count alleged defamation and/or fraud. Dominguez failed to sustain her burden of showing the existence of a triable fact question as to whether O'Brien defamed her by making (1) "a false and defamatory statement concerning another"; (2) "an unprivileged publication to a third party"; (3) "fault amounting at least to negligence on the part of the publisher"; and (4) "either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication." Dunlea v. Dappen, 83 Hawai'i 28, 36, 924 P.2d 196, 204 (1996), abrogated on other grounds by Hac v. Univ. of Hawai'i, 102 Hawai'i 92, 106-07, 73 P.3d 46, 60-61 (2003).

Dominguez also failed to carry her summary judgment burden of demonstrating a triable issue as to whether there existed any evidence clear and convincing enough to support a finding of fraud. Dobison v. Bank of Hawaii, 60 Haw. 225, 226, 587 P.2d 1234, 1235 (1978) (per curiam). The evidence had to show that (1) false representations were made by defendant, (2) with knowledge of their falsity (or without knowledge of their truth or falsity), (3) in contemplation of plaintiff's reliance upon these false representations, and (4) plaintiff did rely upon them. Kang v. Harrington, 59 Haw. 652, 656, 587 P.2d 285, 289 (1978). Dominguez also had to show that she suffered substantial

pecuniary damage for "[t]he aim of compensation in deceit cases is to put the plaintiff in the position he would have been had he not been defrauded." Ellis v. Crockett, 51 Haw. 45, 52, 451 P.2d 814, 820 (1969). Dominguez advances no discernible factual basis for this claim and does not allege that O'Brien ever made any representations to her at all, much less any she relied on to her detriment. In the absence of any evidence whatsoever that O'Brien made any misrepresentations to Dominguez, her claims that she was defrauded fail as a matter of law.

Therefore,

The Final Judgment filed on August 15, 2005 in the Circuit Court of the First Circuit is affirmed.

DATED: Honolulu, Hawai'i, February 2, 2007.

On the briefs:

Erlinda Dominguez,
Plaintiff-Appellant pro se.

Francis T. O'Brien,
Defendant-Appellee pro se.


Chief Judge


Associate Judge


Associate Judge