NO. 27161

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

VICTORIA TABLADA, Plaintiff/Counterclaim Defendant/Appellee, v.
WILLIAM COWARD, Defendant/Counterclaimant/Appellant

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CIVIL NO. 04-1-0807)

MEMORANDUM OPINION
(By: Recktenwald, C.J., Foley, and Leonard, JJ.)

Defendant-Counterclaimant-Appellant William Coward **(Coward)**, proceeding pro se, appeals from the Judgment filed on February 4, 2005 in the Circuit Court of the First Circuit (**Circuit Court**).[1] The Circuit Court granted Plaintiff-Counterclaim Defendant-Appellee Victoria Tablada's (**Tablada**) Motion to Dismiss Coward's Counterclaim as a sanction for Coward's failure to properly submit to discovery after: (1) twice being ordered to give discovery; and (2) being informed, in the Circuit Court's Order, that failure to complete the discovery would result in the dismissal of Coward's Counterclaim. The Circuit Court also denied Coward's requests for reconsideration and granted, in part, Tablada's Motion to Tax Costs and Disbursements.

BACKGROUND

On February 4, 2004, Tablada filed a Complaint in the District Court of the First Circuit, Koolaupoko Division, against Coward, seeking summary possession of a Kailua residence rented by Coward and damages for unpaid rent. On February 19, 2004, Coward filed a Counterclaim alleging that his personal property was damaged by water intrusion at the residence and that Tablada was

1 The Honorable Eden Elizabeth Hifo presided.

liable for damages in the amount of $35,124.94. Following the resolution of Tablada's claims in her favor, Coward's Counterclaim was transferred to the Circuit Court. Trial was set for January 18, 2005.

On September 4, 2004, Tablada sent Coward a First Request For Answers to Interrogatories. Coward claims he never received the interrogatories, explaining his mail was picked up by a neighbor, who subsequently failed to deliver the mail to him. After receiving no response from Coward, Tablada sent letters on October 11, 2004, and October 26, 2004, requesting that he provide his answers.

After still receiving no response, on November 8, 2004, Tablada filed a Motion to Compel Answers to Interrogatories, which was set for hearing on November 17, 2004.

Meanwhile, on November 3, 2004, Tablada noticed Coward's deposition for November 12, 2004. Coward appeared at his scheduled deposition, answered a few questions about his name and address, and then became argumentative during counsel's instructions and objected to nearly all of the preliminary questions asked during the deposition. Coward refused to answer background questions regarding his date and place of birth, stating that he only wanted to answer damages and liability questions pertaining to his counterclaim. During the deposition, Tablada's counsel provided Coward with a copy of both Rule 26 and Rule 37 of the Hawai'i Rules of Civil Procedure ("HRCP"). After 18 minutes, Coward walked out of his deposition.

Prior to the November 17, 2004 hearing on the Motion to Compel, Tablada filed a Supplemental Memorandum, including a transcript of the aborted deposition. At the hearing, the Court clearly informed the parties that Coward's deposition would continue after Coward responded to Tablada's interrogatories, notwithstanding that the deposition would occur after the discovery cutoff.

Nevertheless, upon receiving the notice for his continued deposition, Coward filed a Motion to Quash the taking of his deposition, along with an ex parte motion to shorten time. On December 10, 2004, the Court denied Coward's Motion to Quash and ordered him to attend the second scheduled deposition. The December 10, 2004 Order explicitly warned Coward that his failure to "appear and complete" the deposition would result in dismissal.

On December 13, 2004, Coward appeared for his second deposition. Coward again refused to provide answers to numerous questions, which he objected to as "irrelevant." He again refused to provide information regarding his educational background, professional licenses, prior employment, and involvement in prior litigation. Tablada's questions included inquiries about alleged multiple prior disputes and/or lawsuits with landlords or roommates, the condition of the allegedly damaged personal property when it arrived at the rented premises, where the damaged property was moved after it left the premises, and other questions that were relevant or reasonably calculated to lead to the discovery of admissible evidence. For example, although Coward apparently sought $25,000 in damages for water damage to an organ, he evaded or refused to respond to questions related to the alleged "collector's value" of the organ. With few exceptions, Coward's responses throughout the deposition were combative as well as nonresponsive.

On December 16, 2004, Tablada filed a Motion to Dismiss Coward's Counterclaim, pursuant to Hawai'i Rules of Civil Procedure (**HRCP**) Rule 37.[2] At the hearing on the Motion to

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2 HRCP Rule 37 provides, in relevant part:

> (a) *Motion for order compelling discovery.* A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:
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> . . .

Dismiss, the Court granted the motion for good cause, discussed

> (2) MOTION. If a deponent fails to answer a question propounded or submitted under Rules 30 or 31, . . . or a party fails to answer an interrogatory submitted under Rule 33, . . . the discovering party may move for an order compelling an answer. . . . The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or material without court action. When taking a deposition on oral examination, the preoponent of the question may complete or adjourn the examination before applying fOr an order.
>
> (3) EVASIVE OR INCOMPLETE ANSWER OR RESPONSE. For purposes of this subdivision an evasive or incomplete response is to be treated as a failure to answer or respond.
>
> . . .
>
> (b) *Failure to comply with order:*
>
> . . .
>
> (2) SANCTIONS BY COURT IN WHICH ACTION IS PENDING. If a party . . . fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
>
> (C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;
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> (d) *Failure of party to attend at own deposition or serve answers to interrogatories or respond to request for inspection.* If a party . . . fails (1) to appear before the officer who is to take the deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under subparagraphs (A), (B), and (C) of subdivision (b)(2) of this rule. Any motion specifying a failure under clause (2) or (3) of this subdivision shall include a certification that the movant has in good faith conferred or attempted to confer with the party failing to answer or respond in an effort to obtain such answer or response without court action. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

the severity of the sanctions, and made specific findings that Coward's conduct was willful and contumacious, based on the Court's review of the interrogatory responses, the deposition transcripts, the prior orders, and the history of the matter.

Thereafter, Coward moved for reconsideration and moved (twice) to allow submission of psychiatric reports under seal (for the proposition that a psychological impairment rendered Coward incapable of coping with the deposition questions), moved (twice) for a recusal of the Circuit Court judge due to alleged partiality and bias, moved to vacate the order denying reconsideration, and filed various ex parte motions to shorten time and other submissions.

Judgment was entered on February 4, 2005. Pursuant to Tablada's motion and bill of costs, Coward was awarded $400 in costs (for the filing fee for the demand for jury trial and the fee for docketing in Circuit Court), with all other costs denied. A notice of appeal was timely filed on March 4, 2005.

POINTS ON APPEAL

On appeal, Coward argues that the Circuit Court erred when it:

(1) dismissed Coward's Counterclaim with prejudice as a discovery sanction for his failure to complete his deposition;

(2) granted Tablada's Motion to Tax Costs and Disbursements;

(3) denied Coward's Motion for Reconsideration, including the Circuit Court's denial of Coward's request to allow submission of new evidence under seal; and

(4) denied Coward's Motion to Extend the Discovery Cutoff Date, including the Circuit Court's denial of Coward's request for a hearing on shortened time.

STANDARDS OF REVIEW

A. Discovery Sanction

We review the Circuit Court's imposition of a discovery abuse sanction for abuse of discretion. "A court abuses its discretion whenever it exceeds the bounds of reason or disregards rules or principles of law or practice to the substantial detriment of a party. In addition, regardless of whether sanctions are imposed pursuant to statute, circuit court rule, or the trial court's inherent powers, such awards are reviewed for an abuse of discretion." In re Guardianship of Carlsmith, 113 Hawai'i 211, 223, 151 P.3d 692, 704 (2006) (internal quotation marks, citations, brackets, and ellipsis omitted).

B. Motion to Tax Costs and Disbursements

We review the Circuit Court's taxation of costs for an abuse of discretion. The award of taxable costs is within the discretion of the trial court and will not be disturbed absent a clear abuse of discretion. Fujimoto v. Au, 95 Hawai'i 116, 137, 19 P.3d 699, 720 (2001).

C. Motion for Reconsideration

We review a "trial court's ruling on a motion for reconsideration . . . under the abuse of discretion standard." Ass'n of Apt. Owners of Wailea Elua v. Wailea Resort Co., Ltd., 100 Hawai'i 97, 110, 58 P.3d 608, 621 (2002). An abuse of discretion occurs if the trial court has "clearly exceeded the bounds of reason or disregarded rules or principles of law or practice to the substantial detriment of a party litigant." Amfac, Inc. v. Waikiki Beachcomber Inv. Co., 74 Haw. 85, 114, 839 P.2d 10, 26 (1992) (citation omitted).

> [T]he purpose of a motion for reconsideration is to allow the parties to present new evidence and/or arguments that could not have been presented during the earlier adjudicated motion. Reconsideration is not a device to relitigate old matters or to raise arguments or evidence that could and should have been brought during the earlier proceeding.

Ass'n of Apt. Owners of Wailea Elua v. Wailea Resort Co., 100 Hawai'i 97, 110, 58 P.3d 608, 621 (2002)(internal quotation marks and citation omitted).

D. Extension of Discovery Deadline

HRCP Rule 16(b) provides that, "a schedule shall not be modified except upon a showing of good cause and by leave of the court." The denial of a Rule 16(b) motion is reviewed for abuse of discretion. See Johnson v. Mammoth Recreations, Inc., 975 F.2d 604, 609 (9th Cir. 1992).

DISCUSSION

After a careful review of the record and the arguments and supporting authorities presented by the parties, we resolve Coward's points as follows:[3]

(1) In reviewing whether the Circuit Court's dismissal of Coward's Counterclaim as a discovery sanction constitutes an abuse of discretion, we consider the following five factors: (1) the public's interest in the expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to the party moving for sanctions; (4) the public policy favoring disposition of cases on their merits; and (5) the availability of less drastic sanctions. Aloha Unlimited, Inc. v. Coughlin, 79 Hawai'i 527, 533, 904 P.2d 541, 547 (App. 1995), citing W.H. Shipman, Ltd. v. Hawaiian Holiday Macadamia Nut Co., 8 Haw. App. 354, 362, 802 P.2d 1203, 1207 (1990) (citation omitted).

Here, the first two factors weigh in favor of dismissal. Coward's Counterclaim was filed on February 19, 2004, and trial was set for January 18, 2005. In granting the Motion to Dismiss on January 5, 2005, the Court noted, "The trial date is nearly upon us. And there is no good way to resolve this matter other than to grant the motion[.]" Both of Coward's depositions ended

3 Although we have carefully reviewed, analyzed, and considered each of Coward's eleven points of error, we have consolidated related points for the purpose of informing the parties of our disposition of the appeal.

without providing meaningful discovery on numerous permissible topics of discovery due to Coward's failure to cooperate. Coward failed to heed the Circuit Court's Order that his Counterclaim would be dismissed if he failed to appear *and complete* his second deposition.

The third factor, prejudice, looks to whether Coward's actions impaired Tablada's ability to go to trial or threatened to interfere with the rightful decision of the case. Here, the Circuit Court's dismissal order explicitly stated "there is prejudice" and indicated the Court was primarily concerned with Coward's "manifest behavior throughout" the discovery process and his repeated failure to cooperate with discovery requests and court orders. Coward failed to cooperate with both of his scheduled depositions, refused to provide interrogatory responses until compelled to do so, and failed to answer all of the propounded interrogatories, even after being ordered to do so. Coward's failure to provide discovery left Tablada without basic information about Coward that Tablada needed to prepare for trial, including information regarding his educational background, professional licenses, prior employment, and involvement in prior litigation, evidence to be offered on both liability and damages, and constituted a sizeable threat to the "rightful decision of the case." Thus, we conclude Tablada was prejudiced by Coward's actions.

The fourth factor involves the public policy favoring the disposition of cases on their merits. We have previously stated, in Aloha Unlimited, that dismissal as a discovery sanction is contrary to this policy and will only be upheld if it is warranted by the record. 79 Haw. at 533, 904 P.2d at 547. Specifically, the element of willfulness must be demonstrated in the record. Id. This element of willfulness is demonstrated if the record shows that the party against whom a dismissal sanction is sought has either "wrongfully failed to provide discovery [,]"

Richardson v. Sport Shinko (Waikiki Corp.), 76 Hawai'i 494, 507, 880 P.2d 169, 182 (1994), or if "the record clearly shows delay or contumacious conduct[.]" Azer v. The Courthouse Racquetball Corp., 9 Haw. App. 530, 540, 852 P.2d 75, 81 (1993) (both cited in Aloha Unlimited). In this case, the Circuit Court specifically found that Coward's conduct was willful and contumacious based on the repeated failure of Coward to answer a wide variety of legitimate questions in his second deposition after the Court's order that he do so, and in the face of opposing counsel's repeated attempts to specifically identify and explain the applicable discovery rules and the Court's prior ruling to Coward. The transcript of the deposition amply supports the Circuit Court's finding that Coward's conduct throughout the course of the deposition was "contumacious and willful."

The fifth factor concerns the consideration of less drastic available sanctions than a dismissal of Coward's Counterclaim. Here, the Circuit Court's December 10, 2004 Order explicitly warned Coward that his failure to "appear and complete" the deposition would result in dismissal of his Counterclaim. During the deposition, Tablada's counsel also re-read the Court's Order to Coward. At the January 5, 2005 hearing, the Circuit Court considered lesser sanctions but, in light of Coward's failure to comply with the prior order to compel, the impact of Coward's failure on the ability of the case to proceed to trial, and the futility of monetary sanctions in light of Tablada's existing uncollected judgment against Coward, concluded there was "no good way to resolve this matter other than to grant the motion." The Circuit Court did not abuse its discretion in considering all submissions of the parties, including Tablada's January 3, 2005 Memorandum in Support of the Motion to Dismiss and Coward's January 5, 2005 Supplemental Memorandum in Opposition, the substance of which were argued to the Court at the January 5, 2005 hearing.

Based on our review of the record and analysis of the above factors, we conclude that the Circuit Court did not abuse its discretion in dismissing Coward's Counterclaim.

(2) Coward argues the Court erred when it granted Tablada's Motion to Tax Defendant's Costs and Disbursements. Coward posits that because the Court erred in dismissing his counterclaim, an award of costs was improper. HRCP Rule (54)(d) states that, "[e]xcept when express provision therefor is made either in a statute or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs[.]" Bjornen v. State Farm Fire and Cas. Co., 81 Hawai'i 105, 107, 912 P.2d 602, 604 (App. 1996). Hawaii Revised Statutes § 607-9 (1993) also provides:

> **§607-9 Cost charges exclusive; disbursements.** No other costs of court shall be charged in any court in addition to those prescribed in this chapter in any suit, action, or other proceeding, except as otherwise provided by law.
>
> All actual disbursements, including but not limited to, intrastate travel expenses for witnesses and counsel, expenses for deposition transcript originals and copies, and other incidental expenses, including copying costs, intrastate long distance telephone charges, and postage, sworn to by an attorney or a party, and deemed reasonable by the court, may be allowed in taxation of costs. In determining whether and what costs should be taxed, the court may consider the equities of the situation.

(Emphasis added.)

Upon review, we conclude that the award of the filing fees was reasonable and supported by applicable law. However, pursuant to HRS § 607-4(b)(3), HRS § 607-5(b)(3)&(c)(21), and the applicable Cost and Fee Schedule for the Civil Division of the District Court of the State of Hawaii, the filing fee for the demand for jury trial was $200 fee and the fee for the transfer to the Circuit Court was $125 (not $200, as awarded by the Circuit Court). Therefore, we reverse the award of costs in the amount of $400 and award costs in the amount of $325.

(3) Coward argues the Court erred when it denied reconsideration and refused to allow new evidence under seal in

support of his reconsideration motions. Coward maintains the excluded evidence explained why he was unable to answer personal history questions at his depositions and supports his argument that he conducted his depositions in "good faith." Motions for reconsideration are not justified on the basis of "new evidence" which could have been discovered prior to the Court's ruling. See Gossinger v. Ass'n of Apt. Owners of Regency of Ala Wai, 73 Haw. 412, 427, 835 P.2d 627, 635 (1992) (finding a motion for reconsideration was properly denied where new evidence "could have and should have" been presented before the trial court's determination on a summary judgment motion); Cho v. State, 115 Hawai'i 373, 382, 168 P.3d 17, 26 (2007) (denying a motion for reconsideration because it "failed to adduce evidence that such matters could not have been raised during the earlier hearing").

Coward does not explain why evidence of his mental health was unavailable prior to the January 5, 2005, Motion to Dismiss hearing. If Coward suspected a psychological condition was to blame for his evasiveness at either of his depositions, he should have investigated that theory immediately thereafter, rather than waiting until after his Counterclaim was dismissed. See Matsumoto v. Asamura, 5 Haw. App. 628, 631-33, 706 P.2d 1311, 1313-15 (1985) (holding that evidence was not "newly discovered" where party failed to exercise due diligence in discovering the evidence earlier). We therefore conclude that the Circuit Court did not abuse its discretion in denying Coward's Motion for Reconsideration.

(4) On appeal, Coward maintains that the Circuit Court erred when it denied his Motion to Extend Discovery Cut Off Date, and the related ex parte motion to shorten time for hearing, because there was a sufficient showing of "good cause" to extend the cutoff date. In order to obtain an extension of the discovery deadline, a party must establish that an amendment of the Court's Scheduling Order is appropriate. Pursuant to HRCP Rule 16(b), "a

schedule shall not be modified except upon a showing of good cause and by leave of the court." HRCP Rule 16(b). The primary measure of Rule 16's "good cause" standard is the moving party's diligence in attempting to meet the case management order's requirements. Johnson v. Mammoth Recreations, Inc., 975 F.2d 604, 609 (9th Cir. 1992); Noyes v. Kelly Services, 488 F.3d 1163, 1174 n.6 (9th Cir. 2007).

Here, Coward waited to bring his Rule 16 motion until after the discovery cutoff date had already passed. Although Coward claims to have exercised due diligence by attempting to schedule a deposition or serve interrogatories to Tablada while she was out of the country (even though he admitted knowing for several months that Tablada planned to be out of the country), there is no evidence in the record that Coward ever served a notice of deposition or served interrogatories. Coward's conduct, therefore, does not show the diligence required to meet Rule 16's "good faith" standard. Accordingly, we conclude that the Circuit Court did not abuse its discretion in denying Coward's Motion to Extend Discovery Cut Off Date.

For the foregoing reasons, the Circuit Court's Judgment filed on February 4, 2005 is affirmed, although its award of costs is reduced from $400 to $325. Affirmed in part, reversed in part.

DATED: Honolulu, Hawai'i, March 25, 2008.

On the briefs:

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Chief Judge

Associate Judge

Associate Judge