

NOT FOR PUBLICATION IN WEST'S HAWAI'I REPORTS AND PACIFIC REPORTER

NO. 27386

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

NANETTE SCHNARS, Plaintiff-Appellant, v.
WILLIAM JAMES LEE, DDS, Defendant-Appellee

K. HAMAKADO
CLERK, APPELLATE COURTS
STATE OF HAWAI'I

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FILED

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(Civ. No. 04-1-0708)

SUMMARY DISPOSITION ORDER

(By: Foley, Presiding Judge, Nakamura and Fujise, JJ.)

Plaintiff-Appellant Nanette Schnars (Schnars) appeals from the July 18, 2005 Judgment of the Circuit Court of the First Circuit (circuit court)¹ in favor of Defendant-Appellee William J. Lee, D.D.S. (Lee) in this dental malpractice case.

After a careful review of the issues raised, arguments advanced, law relied upon, and the record in the instant case, we resolve Schnars's appeal as follows:

1. The circuit court properly granted Lee's motion for summary judgment. Although Schnars argues that the circuit court erred in granting Lee's motion for summary judgment because this case was pending arbitration under the Court Annexed Arbitration Program (CAAP), under the Hawai'i Court Annexed Arbitration Rules (HAR) Rule 7(f), a dispositive motion such as a motion for summary judgment may be brought before the circuit court "notwithstanding the fact that a case is under the [CAAP]." Thus, the circuit court had the proper authority to rule on Lee's summary judgment motion in this case.

Schnars did not file a formal separate motion seeking any relief under Hawai'i Rules of Civil Procedure (HRCP)

¹ The Honorable Eden Elizabeth Hifo presided.

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Rule 56(f).² Although a HRCP Rule 56(f) request need not be made in a separate motion, the affidavit³ in support of the HRCP Rule 56(f) must sufficiently meet the requirements of the rule. See Theotokatos v. Sara Lee Pers. Prods., 971 F. Supp. 332, 344 (N.D. Ill. 1997). Request for relief under HRCP Rule 56(f) requires the party opposing the summary judgment motion to "provide reasons why she could not 'present by affidavit facts essential to justify her opposition'" and "to demonstrate how postponement of a ruling on the motion would enable her, by discovery or other means, to rebut [the] showing of absence of a genuine issue of fact." Acoba v. Gen. Tire, Inc., 92 Hawai'i 1, 12, 986 P.2d 288, 299 (1999).

The declaration of Schnars's counsel referenced HRCP Rule 56(f) in name only, and failed to provide any specific reasons why she could not present facts to rebut Lee's summary judgment motion, or how postponing the ruling on the motion would enable her to gather such facts. Moreover, the declaration made no request for relief under HRCP Rule 56(f). The declaration submitted by Schnars in response to Lee's summary judgment motion did not constitute a request for relief under HRCP Rule 56(f) and therefore the circuit court made no ruling under HRCP Rule 56(f).

Schnars submitted only her counsel's declaration in response to Lee's motion for summary judgment. The declaration did not oppose the motion on the merits and failed to "set forth specific facts showing that there is a genuine issue for trial." HRCP Rule 56(e). Since Schnars failed to properly request relief

² HRCP Rule 56(f) states:

When affidavits are unavailable. 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.

³ Counsel for Schnars filed a declaration in lieu of an affidavit. Rules of the Circuit Courts of the State of Hawai'i Rule 7(g) allows the use of a declaration in place of an affidavit.

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under HRCF Rule 56(f) and did not substantively oppose Lee's summary judgment motion, the circuit court properly granted Lee's motion.

Therefore,

IT IS HEREBY ORDERED that the July 18, 2005 Judgment of the Circuit Court of the First Circuit is affirmed.

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

On the briefs:

Gary V. Dubin,
for Plaintiff-Appellant.


Presiding Judge

John Reyes-Burke,
(Burke McPheeters Bordner &
Estes),
for Defendant-Appellee.


Associate Judge


Associate Judge