Becheserrak v. Eritem Lineage, 14 ROP 80 (2007)

RACHEL BECHESERRAK,
Appellant,

v.

ERITEM LINEAGE,
Appellee.

CIVIL APPEAL NO. 06-002
Civil Action No. 05-082

Supreme Court, Appellate Division
Republic of Palau

Decided: April 17, 2007[1]

Counsel for Appellant: Carlos H. Salii

Counsel for Appellees: John K. Rechucher

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; J. UDUCH SENIOR, Associate Justice Pro Tem; JANET H. WEEKS, Part-Time Associate Justice.

Appeal from the Trial Division, the Honorable LARRY W. MILLER, Associate Justice, presiding.

PER CURIAM:

This matter involves a parcel of land, Cadastral Lot No. 022 N 01, located in Ngetkib of Airai State. The land is also known as Ngkeang or Ngermelnges. On March 31, 2005, Appellee Eritem Lineage filed a motion for a temporary restraining ⊥81 order that would bar Appellant Becheserrak[2] and family from burying their deceased father on the disputed parcel of land. Appellee's motion was granted and a temporary restraining order was issued.

Even after the burial was completed elsewhere, though, Appellant continued to use and claim ownership of the land in question. Appellee Eritem Lineage amended their complaint to move for an injunction forbidding Appellant from using the land and to claim damages for trespass. Appellee motioned for summary judgment and submitted a certificate of title for Cadastral Lot No. 022 N 01, the disputed piece of land, which had been awarded to them by the Land Court in 1997, following a hearing before the Land Claims Hearing Office (LCHO) in

[1]Upon reviewing the briefs and the record, the panel finds this case appropriate for submission without oral arguments pursuant to ROP R. App. P. 34(a).

[2]The original Appellant in this matter, Katsutoshi Becheserrak, passed away on August 2, 2006, during the pendency of this appeal. Upon motion to this Court and pursuant to Rule 43 of the ROP Rules of Appellate Procedure, his widow, Mrs. Rachel Becheserrak, has been substituted as the Appellant in this appeal. Although this opinion examines the actions and statements of the late Appellant, Katsutoshi Becheserrak, the current Appellant before the Court is Rachel Becheserrak.

1994.

Appellant Katsutoshi Becheserrak filed his opposition to summary judgment claiming that he had established the existence of a material issue of fact by certain statements made in his affidavit. He alleged that these material issues of fact involved the sale of the land, his open and notorious use, and the legal consequences of such sale and use. Becheserrak also submitted a signed affidavit in which he swears, *inter alia*, "that neither I nor my mother participated in a hearing which led to the issuance of Certificate of Title to Lot No. 022 N 01." Affidavit of Defendant Katsutoshi Becheserrak, August 31, 2005, at ¶ 26. Eritem Lineage replied by pointing out that Defendant Katsutoshi Becheserrak's mother, Ana Becheserrak, and her family "neither filed a claim for the land nor appeared at the hearing to present their claim to the property." Plantiff's Reply to Defendants' Memorandum in Opposition to Motion for a Summary Judgment, September 13, 2005, at 2.

The trial court granted summary judgment in favor of Appellee Eritem Lineage, finding that Becheserrak had failed to put forward any evidence showing that the LCHO did not comply with its procedural requirements regarding notice. In the absence of such evidence, the defendant's assertion that he did not participate in the LCHO hearing failed to rebut the presumption that due public and private notice was given. Judgment was entered in favor of Appellee Eritem Lineage and the trial court ordered Appellant Becheserrak to remove the tomb constructed on the land belonging to Eritem Lineage and to pay the Lineage $10,000 in damages. For the reasons set forth below, we affirm the Trial Division's judgment.

STANDARD OF REVIEW

This Court reviews grants of summary judgment *de novo*, considering whether the trial court correctly found that there was no genuine issue of material fact and whether, drawing all inferences in the light most favorable to the nonmovant, the moving party was entitled to judgment. *Giraked v. Estate of Rechucher*, 12 ROP 133, 139 (2005). The ⊥82 sole responsibility of the trial court at summary judgment is to determine whether genuine issues of material fact exist; it is not to make factual determinations where facts remain in dispute. *ROP v. Reklai*, 11 ROP 18, 23 (2003).

ANALYSIS

Appellant Becheserrak asserts that his affidavit declaration that "neither I nor my mother participated in a hearing which led to the issuance of Certificate of Title to Lot No. 022 N 01" created a factual issue that should have precluded summary judgment. Appellant admits that the evidence presented to the trial court failed to specifically demonstrate that he had not received notice of the LCHO hearing, but he contends that there was a strong suggestion in his affidavit that no such notice was received. Appellant claims that the trial court erred in failing to infer that he did not receive notice of the hearing.

Appellant also maintains that the trial court incorrectly relied on *Ucherremasch v. Rechucher*, 9 ROP 89, 89 - 90 (2002), which states, "each person with notice of [a Land Court]

hearing and an alleged interest in the land must file a timely written claim asserting his or her position. Failure to do so constitutes a waiver of the claim." The trial court relied on *Ucherremasch* to support its conclusion that, having failed to put forward a claim before the LCHO, "whatever claims Appellant might have had to the disputed property were extinguished by the issuance of the certificates of title to Appellee." *Id.* at 92. Appellant claims that the trial court's summary judgment prevented him from presenting evidence demonstrating that he did not receive notice of the LCHO hearing. As such, he maintains he did not waive his claim and this case should not be subject to summary judgment.

Rule 56 of the Republic of Palau Rules of Civil Procedure provides that summary judgment shall be granted if the pleadings, depositions, answers to interrogatories, admissions, or affidavits show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. ROP R. Civ. P. 56 (c). Affidavits of the moving party are to be strictly construed, and those of the opposing party liberally construed. *ROP v. Reklai*, 11 ROP 18, 21 (2003). Summary judgment is appropriate against a nonmoving party who fails to make an evidentiary showing sufficient to raise a factual question as to an element essential to that party's case and on which that party will bear the burden of proof at trial. *Wolff v. Sugiyama*, 5 ROP Intrm. 105, 109 (1995); *Aquino v. Nestor*, 11 ROP 278 (Tr. Div. 2004). The standard for defeating a properly supported motion for summary judgment is clearly set forth in *Wolff v. Sugiyama*, 5 ROP Intrm. 105, 110 (1995), which states:

> For a party to defeat a properly supported motion for summary judgment made against it based on the absence of an essential element on which the nonmoving party will bear the burden of proof at trial, the nonmoving party must offer evidence to dispute the facts advanced by the movant and show that there is a genuine issue of material fact to be resolved by the fact-finder. The mere existence of some ⊥83 alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact. (citations omitted).

To be "genuine," the evidence offered by the nonmovant must be sufficient to support a trier of fact's finding in the nonmovant's favor on the disputed fact. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted. The nonmoving party who will bear the burden of proof at trial on the challenged element cannot rely on conclusory allegations in an affidavit to establish a genuine issue of fact. (citations omitted).

Appellant admits that he failed to state explicitly that he did not receive notice of the LCHO hearing. Instead, he claims that his affidavit contained a very strong inference that he did not receive such notice. However, even the most liberal construction of the Appellant's evidence does not meet the standard necessary to withstand a motion for summary judgment.

This Court will not infer that Appellant did not receive notice of the LCHO hearing. Inferring that Appellant's non-participation in the LCHO proceeding was caused by a procedural failure on the part of the LCHO would require an inordinate and unfounded reach by this Court. Such an inference would require the Court to suppose facts that are not the natural consequence

of the Appellant's statements; failure to attend a LCHO hearing could have been caused by any manifold number of reasons. Additionally, such an inference would run contrary to the established policy of this Court to presume that the LCHO followed its procedural requirements, unless otherwise proven. *Ucherremasech v. Wong*, 5 ROP Intrm. 142, 146 (1995). As a nonmovant with the burden of proving that he did not receive notice of the LHCO hearing, Appellant was responsible for providing evidence that a genuine issue of fact existed. His assertion that he did not attend the hearing falls far below the standard of evidence he was required to present.

Appellant's allegation that the trial court incorrectly relied on *Ucherremasch* demonstrates a fundamental misunderstanding of that case. *Ucherremasch* simply provides that if an individual failed to file a timely written claim with the Land Court, or failed to attend the LCHO hearing, that person's claim is considered waived. *Ucherremasch v. Rechucher*, 9 ROP 89, 89-90 (2002). If, as here, a party avers that they did not file a claim or attend a hearing because they did not receive notice, that party has the burden of proving by clear and convincing evidence that the Land Court did not follow their established procedural notice requirements. *Ucherremasech v. Wong*, 5 ROP Intrm. 142, 147 (1995). In his opposition to the motion for summary judgment, Appellant was given ample opportunity to present any evidence that he did not receive notice of the LCHO hearing. Appellant presented no such evidence and, accordingly, summary ⊥84 judgment was ordered against him.

CONCLUSION

For the reasons set forth above, we affirm the Trial Division's entry of summary judgment in favor of Eritem Lineage.