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and TERI FERREIRA-IGE

IN THE CIRCUIT COURT OF THE FIFTH CIRCUIT

STATE OF HAWAI'I

| | | |
|-----------------------------|---|------------------------------------|
| CARLOS LAWRENCE ANDRADE, |) | CIVIL NO. 16-1-0209 |
| |) | (Quiet Title) |
| Plaintiff, |) | |
| |) | DEFENDANTS' MEMORANDUM IN |
| vs. |) | OPPOSITION TO PLAINTIFF'S MOTION |
| |) | FOR SUMMARY JUDGMENT |
| KUOLULU (k); |) | QUIETING TITLE AND DIRECTING |
| MANUEL RAPOSO A.K.A. MANUEL |) | PARTITION OF SUBJECT PARCELS; |
| RAPOZO; et al., |) | DECLARATION OF LAUREL K.S. LOO; |
| |) | EXHIBITS "A" – "B"; CERTIFICATE OF |
| Defendants. |) | SERVICE |
| |) | |
| |) | |
| |) | |

**DEFENDANTS' MEMORANDUM IN OPPOSITION TO
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT QUIETING TITLE AND
DIRECTING PARTITION OF SUBJECT PARCELS**

I. INTRODUCTION

Defendants MERWIN ANDREW STAPP, JR. (“Merwin”), SHARON MARGARET STAPP (“Sharon”) (collectively, the “Stapps”), JENNIE GUERRERO (“Ms. Guerrero”), and TERI FERREIRA-IGE (“Ms. Ferreira-Ige”), through their counsel McCorriston Miller Mukai MacKinnon LLP and Shiramizu Loo & Nakamura LLLP, respectfully oppose Plaintiff CARLOS ANDRADE’s (“Plaintiff”) Motion for Summary Judgment Quieting Title and Directing Partition of Subject Parcels, filed on September 7, 2018 (“Motion”). The Motion should not be granted for several reasons. First, genuine issues of material fact exist concerning transfers of interest to Plaintiff and to former Plaintiff, now-Defendant NORTHSORE KALO, LLC (“Northshore Kalo”), a shell company of Mark Zuckerberg, the founder and CEO of Facebook. If those transfers were procured through misrepresentations or undue influence, then the transactions may be void, creating a dispute as to the fee simple title in the Parcels.¹ Second, a genuine issue of material fact exists regarding the practicability of a partition in kind. Plaintiff fails to prove that such a partition is impractical as a matter of law, and Defendants are entitled to discovery on the matter, including the appointment of a commissioner to examine the issue. Finally, and in the alternative, Defendants bring additional factual issues to the Court’s attention that materially affect the analysis of whether to partition in kind or by sale. To properly address these factual

¹ The Parcels referred to herein are:

- (1) Apana 1 of Land Commission Award No. 6313 to KUOLULU (k), containing 0.12 acres and identified as Tax Map Key No. (4) 5-1-004-017;
 - (2) Apana 2 of Land Commission Award No. 6313 to KUOLULU (k), containing 0.29 acres and identified as Tax Map Key No. (4) 5-1-004-019;
 - (3) Apana 1 of Land Commission Award No. 6640 to Nika, containing 1.59 acres and identified as Tax Map Key No. (4) 5-1-004-025; and
 - (4) Apana 2 of Land Commission Award No. 6640 to Nika, containing 0.25 acres and identified as Tax Map Key No. (4) 5-1-004-026,
- each situated at Pila‘a, Hanalei, County of Kaua‘i, State of Hawai‘i. Complaint at 14-15.

issues, Defendants request an order continuing the hearing on this Motion until sufficient discovery may be propounded, produced, and reviewed.

For these reasons, described in more detail below, summary judgment is not warranted and the Motion should be denied.

II. PERTINENT FACTUAL BACKGROUND

Plaintiff filed this action to quiet the title and partition the Parcels pursuant to Chapters 668 and 669 of the Hawaii Revised Statutes (“HRS”). Based on Exhibits “1” through “267” and the declarations of Plaintiff, Plaintiff’s counsel, Colleen Uahinui, Malia Rogers, Ami Mulligan, Plaintiff summarizes his belief as to those persons and/or entities with interests in the Parcels. The division of interests Plaintiff proffers in his Motion is different than it was in his Complaint because both Plaintiff and Northshore Kalo have facilitated numerous transactions to increase their respective interests since the start of this litigation. See Motion, Exhibits “D” and “E” (summarizing their respective interests).

To persuade co-owners to transfer their respective shares, Plaintiff represented that he would keep the Parcels in the family; that such transfers would help them keep third party foreigners from obtaining interests in the Parcels; and that he would ensure that the transferors could visit and use the Parcels whenever they wanted. See Exhibit “A,” Declaration of Jennie Guerrero (“Guerrero Decl.”) ¶¶ 6-8. Specifically, Ms. Guerrero recounts Plaintiff’s communications with Defendant KATHERINE SILVA and her mother, Olivia Evans, asking them to transfer their respective interests to him and promising to protect the family’s interest in these Parcels. Id. ¶¶ 3-9. Other defendants can also testify regarding Plaintiff’s tactics, and given an opportunity for discovery, Defendants expect that additional admissible evidence will support Plaintiff’s misrepresentations. Declaration of Laurel K.S. Loo (“Loo Decl.”) ¶ 3.

With respect to Northshore Kalo’s solicitation of interests, the tactics are also problematic. Defendant TERI FERREIRA-IGE nearly transferred her interest to Northshore Kalo because of its purposeful implication that such a transfer would benefit local taro farmers on the north shore of Kaua‘i. Exhibit “B,” Declaration of Teri Ferreira-Ige (“Ferreira-Ige Decl.”) ¶¶ 5-11. When upon further research Ms. Ferreira-Ige confronted Northshore Kalo’s counsel with this misrepresentation, its counsel admitted that Mark Zuckerberg owned and/or controlled Northshore Kalo and that it was not a local taro company. *Id.* ¶¶ 9-11. At that point, Northshore Kalo’s tactics shifted. To convince Ms. Ferreira-Ige to change her mind and transfer her interest anyway, Northshore Kalo’s counsel threatened to file a lawsuit against her; threatened that such legal processes would be long and expensive; threatened that she would be responsible for Northshore Kalo’s attorneys’ fees and costs; and threatened that she may also be liable to Plaintiff for back property taxes going back decades. *Id.* ¶ 12. Other defendants can also testify regarding former plaintiff Northshore Kalo’s undue influence on real estate transactions. Given the opportunity for further discovery, Defendants expect that additional admissible evidence will support Northshore Kalo’s misconduct. Loo Decl. ¶ 4.

The Complaint and the Motion ask the Court to direct a partition by sale for these Parcels. Complaint at 74; Motion at 61. Outside of his pleading and his own declaration, however, Plaintiff does not produce any evidence to support the conclusion that partition by sale is warranted, let alone appropriate. Motion at 61; Declaration of Carlos Andrade (“Andrade Decl.”) ¶¶ 27-28.

III. LEGAL STANDARD

Summary judgment is a drastic remedy which must be cautiously invoked in order to avoid improperly depriving a party to a lawsuit [or in this case many parties to a lawsuit] of the

right to a trial on dispute factual issues.” Mendick v. Davey, 87 Hawai‘i 450, 455, 959 P.2d 439, 444 (1998). The “moving party bears the ultimate burden of persuasion . . . [which] always remains with the moving party and requires the moving party to convince the court that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. Ralston v. Yim, 129 Hawai‘i 46, 57, 292 P.3d 1276, 1287 (2013) (emphasis added). On a motion for summary judgment, “[a] fact is material if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or defense asserted by the parties.” Crichfield v. Grand Wailea Co., 93 Hawai‘i 477, 482-83, 6 P.3d 349, 354-55 (2000).

Plaintiff’s burden of proof on a motion for summary judgment is a stringent one because all inferences on the underlying facts alleged in the materials considered by the Court must be viewed in the light most favorable to the defendants. GECC Fin. Corp. v. Jaffarian, 79 Hawai‘i 516, 521, 904 P.2d 530, 535 (App. 1995). “[A]ny doubt concerning the propriety of granting the motion should be resolved in favor of the non-moving party.” Id.

IV. DISCUSSION

The Motion should be denied because genuine issues exist with respect to the ownership interests in the parcels and the practicability of a partition in kind. Alternatively, pursuant to HRCF Rule 56(f), Defendants request a continuance to conduct discovery related to these, and other, genuine issues that are material to the claims and defenses in this matter.

A. A Genuine Dispute Exists As To Plaintiff’s Assignment of Interests In The Parcels

Plaintiff requests judgment as a matter of law based on his representation that there is no genuine issue with respect to the ownership interests in the Parcels, a material fact with respect

to quiet title. Motion at 58-59. Because a genuine issue exists with respect to how the interests were obtained by Plaintiff and Northshore Kalo, summary judgment is not warranted.

Plaintiff summarizes conveyances to Northshore Kalo in Exhibit “D” to the Motion. According to Exhibit “D,” Northshore Kalo received 84 transfers amounting to approximately 43% of the Parcels. Motion at 58, Exhibit “D.” Plaintiff summarizes the conveyances from family members to himself in Exhibit “E” to the Motion. Exhibit “E” lists 34 conveyances to Plaintiff amounting to approximately 27% of the Parcels. Motion at 58, Exhibit “E.”

Defendants dispute these transfers based on testimonial evidence regarding Plaintiff and Northshore Kalo’s respective solicitation strategies. The evidence shows that Plaintiff solicited transfers by misrepresenting that the land would remain “in the family.” Guerrero Decl. ¶ 6. Plaintiff further promised that those who transferred to him would be able to visit and use the Parcels whenever they wanted. *Id.* ¶ 8. These representations were false, considering that he intended to, and did, file a lawsuit along with Northshore Kalo requesting a partition *by sale*, which will likely be won by Northshore Kalo via Mark Zuckerberg, who is not a descendant of Manuel Rapozo. At least one defendant, KATHERINE SILVA,² relied upon Plaintiff’s misrepresentations in deciding to transfer her interests to him. *Id.* ¶ 11; Motion, Exhibit “E”; Motion, Exhibit “130.”

The evidence further shows that Northshore Kalo solicited transfers through implied misrepresentations concerning the nature of its corporation; namely, by suggesting that a transfer

² Plaintiff dismissed Katherine Silva without prejudice on September 22, 2017 after recording her quitclaim deed. Interestingly, Ms. Silva quitclaim deed is dated in 1976, signed in 1986, notarized by a notary whose commission expired in 1988, and recorded in the Bureau of Conveyances in 2017. Because these unusual facts give rise to an inference that the deed is of questionable validity, Defendants request discovery into the circumstances surrounding Ms. Silva’s deed and this transfer.

to Northshore Kalo would support local taro farmers on the north shore of Kaua‘i. Ferreira-Ige Decl. ¶ 6. If an interest holder declined to sell, Northshore Kalo persisted in its solicitation by threatening legal action, attorneys’ fees and costs, and back property taxes. Id. ¶ 12. Plaintiff and Northshore Kalo’s prior status as joint-plaintiffs and their coordinated litigation strategy—to purchase interests and thereafter dismiss defendants from the litigation—serve as additional circumstantial evidence of their improper transfers.³

To the extent Plaintiff induced others to transfer their interests to him through unfair persuasion or by taking advantage of his familial relationship to foster the assumption that he would not act in a manner inconsistent with their welfare, such transfers are voidable. See Restatement (Second) of Contracts § 177. Similarly, if Northshore Kalo induced others to transfer their interests by improper threats that leave them with no reasonable alternative, such transfers are also voidable. Id. § 175. The possibility that these transfers may be void creates a genuine dispute regarding the material fact of ownership. Such a genuine issue precludes summary judgment, and the Motion should be denied.

B. A Genuine Dispute Exists As To The Practicability Of A Partition In Kind

Plaintiff also seeks summary judgment directing partition by sale (1) because the right of partition is imperative; and (2) because partition in kind is impracticable and greatly prejudicial to the co-owners. Motion at 60-61. His request, however, is supported only by his own conclusory declaration stating his opinion that partition in kind would be impracticable. Id. at 61; Andrade Decl. ¶ 27.

³ Based on testimonial evidence and based on their information and belief, Defendants expect that discovery will uncover additional support regarding their improper solicitation tactics. Defendants request a continuance pursuant to HRCF Rule 56(f) so that it may conduct such discovery.

Plaintiff's declaration⁴ is insufficient to support judgment as a matter of law as to the type of partition, especially where Defendants take the opposite position and request at least a partial partition in kind. The practicability of a partition in kind is a genuine issue and supports the denial of this Motion.

To determine the "mode of partition," the Court may consider "the nature and situation of the land, the situation and pecuniary interests of the parties," "the financial ability of one of the parties to purchase the property," and even "[s]entimental reasons, [including] the preservation of the [property]." Pioneer Mill Co. v. Ward, 37 Haw. 74, 91 (Terr. 1945). "[W]hen the partition of real estate cannot be made without great prejudice to the parties the judge may order a sale of the premises and divide the proceeds." Brown v. Cornwell, 20 Haw. 457, 462 (Terr. 1911). "That land sought to be partitioned cannot be divided in kind without great prejudice to the parties *is a material allegation*, and, unless admitted, must be proved. Upon that issue a defendant is entitled to adduce evidence." Id. at 464 (emphasis added).

Here, Defendants do not admit that the Parcels "cannot be divided in kind without great prejudice to the parties." Accordingly, the practicability of partition in kind is a material allegation that Plaintiff must prove and upon which Defendants are permitted discovery. Because this material allegation is in dispute, summary judgment is not appropriate.

Directing a partition by sale of *kuleana* land is also generally inappropriate when disputed at the summary judgment stage. In Hawai'i, the "law requires that real property be partitioned in kind when possible." Tom Leuteneker, Quiet Title and Easements, in HAWAII'S REAL ESTATE LAW MANUAL 9-30 (Deborah Macer Chin ed., 1997). To determine if it is

⁴ Defendants request discovery as to whether Plaintiff will be permitted to retain an in-kind interest in the Parcels based on a pre-existing arrangement with Northshore Kalo.

possible to partition in kind, the Hawai‘i Supreme Court urges courts to focus on whether division is practicable. Chuck v. Gomes, 56 Haw. 171, 178. 532 P.2d 657, 661 (1975) (Richardson, C.J. dissenting). Often this analysis will involve the appointment of a commissioner, who will opine (as an expert would) on the practicability of a dividing the land.

Here, Plaintiff has not provided any evidence or expert analysis on the practicability of partition in kind. Instead, he offers his own declaration, which conclusively argues that the number of owners possessing “only nominal interests” is evidence of impracticability. Motion at 61. In Campbell v. DePonte, 57 Haw. 510, 510-11, 559 P.2d 739, 739-40 (1977), however, the court affirmed partition in kind for a property divided into more than sixty (60) interests. Thus, contrary to Plaintiff’s self-serving claim, the possibility of partition in kind is not foreclosed merely by the number of co-owners.

Rather, courts (especially Hawai‘i courts) should exercise their discretion to evaluate the pecuniary value to each party of a partition in kind *in a holistic manner*, considering “the fundamental importance [of] keeping ancestral land in a particular family line.” Chuck, 56 Haw. at 180, 532 P.2d at 662. Partition in kind “is particularly significant in Hawai‘i where the retention of land ownership in one family line is an important interest worthy of preservation and diligent protection.” Id. at 178, 532 P.2d at 661. Such a culturally sensitive analysis honors the purpose of kuleana land for local tenants, is consistent with Hawai‘i’s constitutional mandate to protect and preserve natural and cultural resources, and separates Hawai‘i from other jurisdictions that “do not take account of the non-economic value that many owners place upon their property,” such as ancestral significance. See Haw. Const. art. XII, § 7; Uniform Partition of Heirs Property Act, Executive Summary and Overview of How the Act Works.

Proper exercise of its discretion to evaluate the propriety and practicality of partition in kind will certainly involve additional factual questions, which the parties will likely dispute. Therefore, when analyzed properly, the issue is even less appropriate for summary judgment.

C. **Alternatively, A Continuance Pursuant To HRCP Rule 56(f) Is Appropriate To Allow Discovery Regarding These Disputed Issues**

HRCP Rule 56(f) allows the Court to “refuse the application for judgment” or to “order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had” when it appears that evidence essential to justify a party’s opposition cannot be presented. Here, if the Court requires additional evidence of genuine factual disputes, a Rule 56(f) continuance is appropriate.

Despite the fact that Plaintiff filed his Complaint on December 30, 2016, this case is still in its early stages. Plaintiff received multiple extensions of time to serve his Complaint, the last of which permitted service through May 2018. Order Granting Plaintiff’s Second Motion for Order to Extend Service and Pretrial Statement Deadlines. In fact, Plaintiff served his Complaint as late as June 13, 2018, and defendants were still filing responsive pleadings as late as July 12, 2018. See Answer and Affirmative Statement of Claim of Defendant Director of Taxation, State of Hawai‘i To the Complaint Filed on December 30, 2016. Furthermore, additional issues with the pleadings remain unresolved, including the Stapps’ motion to set aside entry of default against them, the reconsideration of the Court’s order denying the intervention of Wayne J. Rapozo, and the appeal of the Court’s order denying the intervention of Pila‘a Ranch Hawaii, LLC and Ko‘olau Kai LLC.

Considering these ongoing preliminary issues, it is no surprise that discovery has not yet been propounded by any party thus far. Loo Decl. ¶ 5. More specifically, a commissioner has not been appointed to opine on the practicability of dividing the Parcels in kind. Furthermore,

given the genuine disputes raised by Defendants in this Opposition, discovery could also determine: the amount of property taxes paid, if any, by Plaintiff; the amount of rent Plaintiff owes the other co-owners; the circumstances surrounding the delayed signing of Defendant KATHERINE SILVA's quitclaim deed and the subsequent delayed recording of that deed; the arrangement between Plaintiff and Northshore Kalo with respect to drafting and filing motions; the arrangement between Plaintiff and Northshore Kalo with respect to the payment of attorneys' fees and costs, and the arrangement as to the funding source to remit payment to numerous defendants for assignment of their respective interest to either Plaintiff or Northshore Kalo. Id. ¶ 6. Each of these categories will help determine the correct ownership of the parcels and will provide the Court sufficient context with which to exercise its discretion regarding a partition in kind following the appointment of a commissioner by the Court.

V. CONCLUSION

Based on the foregoing, Defendants respectfully request that this Court deny the Motion, or, in the alternative, order a continuance to permit appropriate discovery.

DATED: Līhu'e, Hawai'i, October 1, 2018.

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LAUREL K.S. LOO

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and TERI FERREIRA-IGE

IN THE CIRCUIT COURT OF THE FIFTH CIRCUIT

STATE OF HAWAI'I

| | | |
|-----------------------------|---|--------------------------------|
| CARLOS LAWRENCE ANDRADE, |) | CIVIL NO. 16-1-0209 |
| |) | (Quiet Title) |
| Plaintiff, |) | |
| |) | DECLARATION OF LAUREL K.S. LOO |
| vs. |) | |
| |) | |
| KUOLULU (k); |) | |
| MANUEL RAPOSO A.K.A. MANUEL |) | |
| RAPOZO; et al., |) | |
| |) | |
| Defendants. |) | |
| _____ |) | |

DECLARATION OF LAUREL K.S. LOO

I, LAUREL K.S. LOO, declare that:

1. I am an attorney duly licensed to practice in the State of Hawai'i and am a partner in the law firm of Shiramizu Loo & Nakamura LLLP, co-counsel for Defendants MERWIN ANDREW STAPP; SHARON MARGARET STAPP; JENNIE GUERRERO; and TERI FERREIRA-IGE (collectively, "Defendants"). I make this Declaration based on personal knowledge, and I am competent to testify to the matters stated herein.
2. I submit this Declaration in support of the Defendants' Opposition to Plaintiff's Motion for Summary Judgment Quieting Title and Directing Partition By Sale ("Opposition").
3. Given an opportunity for discovery, Defendants expect that additional admissible evidence will show that the misrepresentations Plaintiff made to persuade KATHERINE SILVA to convey her interest to him were also made to additional co-owners for the same purpose.
4. Given the opportunity for discovery, Defendants expect that additional admissible evidence will show Defendant NORTSHORE KALO, LLC's misconduct in attempting to purchase the interests of co-owners in the Parcels.

5. The parties have not yet begun propounding discovery due to the long period allowed for Plaintiff to serve his Complaint and the outstanding preliminary issues regarding the intervention/participation of additional parties as defendants.

6. Given the genuine disputes raised by Defendants in this Opposition, discovery could also determine: an expert opinion as to the practicability of partition in kind, the amount of property taxes paid, if any, by Plaintiff; the amount of rent Plaintiff owes the other co-owners; the circumstances surrounding the delayed signing of Defendant KATHERINE SILVA's quitclaim deed and the subsequent delayed recording of that deed; the arrangement between Plaintiff and Northshore Kalo with respect to drafting and filing motions; the arrangement between Plaintiff and Northshore Kalo with respect to the payment of attorneys' fees and costs, and the arrangement as to the funding source to remit payment to numerous defendants for assignment of their respective interest to either Plaintiff or Northshore Kalo., etc.

7. Attached as Exhibit "A" is a true and correct copy of the Declaration of Jennie Guerrero, dated September 30, 2018, and submitted in support of Defendants' Opposition. The original will be filed with the Court upon receipt.

8. Attached as Exhibit "B" is a true and correct copy of the Declaration of Teri Ferreira-Ige, dated September 30, 2018, and submitted in support of Defendants' Opposition. The original will be filed with the Court upon receipt.

I, LAUREL S. LOO, declare under penalty of law that the foregoing is true and correct.

Executed this October 1, 2018 at Līhu'e, Hawai'i.

LAUREL K.S. LOO

IN THE CIRCUIT COURT OF THE FIFTH CIRCUIT

STATE OF HAWAI'I

CARLOS LAWRENCE ANDRADE,) CIVIL NO. 16-1-0209
) (Quiet Title)
 Plaintiff,)
) CERTIFICATE OF SERVICE
 vs.)
)
 KUOLULU (k);)
 MANUEL RAPOSO A.K.A. MANUEL)
 RAPOZO; et al.,)
)
 Defendants.)
 _____)

CERTIFICATE OF SERVICE

I hereby certify that, on the date noted below, a copy of the foregoing document was duly served upon the following persons by hand delivery or by mailing said copy, postage prepaid, first class in a United States post office in the State of Hawai'i, addressed as set forth below:

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