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SCWC-17-0000806

IN THE SUPREME COURT OF HAWAII

PETER J. WINN, WESTMINSTER REALTY, INC.,)	Civil No. 12-1-0087(1)
Plaintiffs-Appellants,)	(Contract)
vs.)	APPEAL FROM ORDER GRANTING
WADE BRADY and KATHERINE T. BRADY,)	INTERVENTORS JAMES E. SPENCE,
individually and as trustees of the WADE K. BRADY FAMILY TRUST, CONTEMPORARY KAMA'AINA, LLC, WESTMINSTER REALTY, INC. as trustee of the 2806 KOLEPA PLACE TRUST DATED DECEMBER 14, 2010, ERIC L. KEILLOR, ERIC S. HART,)	BEVERLY C. SPENCE, STEPHEN R. SPENCE, AND VALORIE A. SPENCE'S MOTION FOR RECONSIDERATION OF ORDER GRANTING JUDGMENT CREDITORS PETER J. WINN AND WESTMINSTER REALTY, INC.'S EX PARTE MOTION FOR FIRST ALIAS WRIT OF EXECUTION, FILED OCTOBER 11, 2017
Defendants-Appellees,)	
JAMES E. SPENCE, BEVERLY C. SPENCE, STEPHEN R. SPENCE, AND VALORIE A. SPENCE,)	
Defendants-Appellees-Intervenors,)	CIRCUIT COURT OF THE SECOND CIRCUIT, STATE OF HAWAII
and,)	The Honorable Rhonda Loo, Judge
JOHN DOES 1-10; DOE CORPORATIONS 1-10; DOE PARTNERSHIPS 1-10; AND DOE ENTITIES 1-10,)	
Defendants.)	

PLAINTIFFS-APPELLANTS-RESPONDENTS' RESPONSE TO PETITIONERS' APPLICATION FOR WRIT OF CERTIORARI

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PLAINTIFFS-APPELLANTS' RESPONSE TO PETITIONERS' APPLICATION FOR WRIT OF CERTIORARI

Plaintiffs-Appellants-Respondents PETER J. WINN, an individual, and WESTMINISTER REALTY, INC., a domestic profit corporation (collectively “Winn” or “Appellants”) respectfully submit this response to Petitioners/Intervenors-Appellees JAMES E. SPENCE and BEVERLY C. SPENCE’s (collectively, “Spences”) application for writ of certiorari, filed March 18, 2024, from the Intermediate Court of Appeals’ (ICA) opinion, *Winn v. Spence*, CAAP-17-0000806 (Haw. Ct. App. Dec. 19, 2023 (“ICA opinion”)). [JEFS] Dkt. 01 (“Spence app.”). This response is filed pursuant to Hawai‘i Rules of Appellate Procedure (HRAP) Rule 40.1.

I. ARGUMENT

A. Constitutional due process is not a “new law”.

The Spences first contend the ICA “created a new law” by requiring compliance with minimum due process requirements and “retroactively impos[ed] the new law” to the prejudice of the Spences. Spence app. at 4.

From the time of the Hawaiian Kingdom to the present, Hawai‘i has required adequate notice in order for procedures to comport with due process - whether they appear in a particular statute or court rule. The ICA did not create new law.

- *Davis v. Bissen*, SCAP-22-0000368 at *12 (Mar. 5, 2024) quoting *Brown v. Thompson*, 91 Hawai‘i 1, 10, 979 P.2d 586, 595 (1999) (“Adequate notice under the Due Process Clause has two components. It must inform affected parties of the action about to be taken against them as well as of procedures available for challenging that action.”);
- *Cole v. City & County of Honolulu*, ___ Hawai‘i ___, 543 P.3d 460, 463 (2024) (“Notice is a core feature of due process.”);
- *Eto v. Muranaka*, 99 Hawai‘i 488, 498, 57 P.3d 413, 423 (2002) (“Our own constitutional due process clauses require that service of process be reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.”);
- *Rodrigues v. Rodrigues*, 7 Haw. App. 102, 747 P.2d 1281 (1987) (family court exercising in rem jurisdiction limited to granting divorce and dividing property and debts listed in the publication of summons to comport with due process requirements);
- *Hustace v. Kapuni*, 6 Haw. App. 241, 248, 718 P.2d 1109, 1114 (1986) (“affidavits devoid of

averments of facts showing that due diligence was exercised to make service have consistently been held to be insufficient. And it has been held that, even where the statute may be satisfied by the bare allegation of due diligence, the requirement of the exercise of diligence and good faith cannot be foregone.”);

- *Freitas v. Gomes*, 52 Haw. 145, 152, 472 P.2d 494, 498 (1970) (“Procedural due process requires that, under all the circumstances, notice must be reasonably calculated to apprise interested parties of the pendency of any proceeding which is to be accorded finality.”);
- *In re Vockrodt*, 50 Haw. 201, 205, 436 P.2d 752, 754–55 (1968) (“to permit notice to be given to a person who can be found by the same method prescribed specifically for persons who cannot be found would be to disregard one of the basic qualifications on the section's applicability.”);
- *Wing Wo Chan & Co. v. Hawaiian Gov't*, 7 Haw. 498, 502 (King. 1888) (“If the proceeding is in rem, actual notice must be given to owners, or if they are not known, constructive notice by a publication of notice, which reasonably may inform them of the tribunal and of the time and place when proceedings are to be had for condemnation.”).

In addition to Hawai'i case law, the ICA properly relied on the U.S. supreme court opinion, *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306 (1950) concerning whether statutory notice by publication satisfied constitutional due process where the names and addresses of those requiring notice were known to the publishing parties. ICA opinion at 10 *quoting id.*, 339 U.S. at 314, *followed by Freitas v. Gomes*, 52 Haw. 145, 472 P.2d 494 (1970). *Mullane* held due process requires notice to be “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Id.*, 339 U.S. at 314. As the ICA correctly noted, the Spences “do not dispute that they had knowledge of the Winn Parties' recorded judgment . . . , and they also do not dispute Winn's declaration stating that they knew how to contact him.” ICA opinion at 8.

Far from creating new case law, the ICA opinion is firmly grounded in local and national jurisprudence addressing constitutional due process.

B. Spences' authorities do not establish error on the part of the ICA.

The Spences contend a court may not change a statute to make it suit a certain set of facts and “this prohibition applies even when a statute is constitutionally deficient.” Spence app. at 5-6 *quoting State v. Bloss*, 64 Haw. 148, 166, 637 P.2d 1117, 1130 (1981). *Bloss* declared an ordinance

unconstitutional for reasons including that it failed to comport with due process. *Id.* In recognizing “the legislative branch of its duty to follow constitutional mandates”, *Bloss* stated, “It is not the role of the courts to rewrite statutes or ordinances in order to cure constitutional defects. [*State v. Abellano*, 50 Haw. 384, 386, 441 P.2d 333, 335 (1968)]. That would be an unconstitutional exercise of legislative power.” *Bloss*, 64 Haw. at 166, 637 P.2d at 1130.

Bloss does not apply to the instant case, where the ICA neither attempted to rewrite HRS § 651-43 nor invalidate the statute as unconstitutional. *Compare id.*, 64 Haw. at 163, 637 P.2d at 1127 (longstanding authorities require penal statutes to state with reasonable clarity the act it proscribes and prescribe fixed standards for adjudging guilt in order to comport with due process).

C. Due process applies to the judicial process of extinguishing a judgment lien

The Spences contend “there was no state action for purposes of constitutional due process” and the judicial foreclosure sale “did not involve the significant assistance of state offices necessary to constitute state action.” Spence app. at 11. The Spences’ contention borders on frivolous.

The Spences’ judicial foreclosure was governed under Hawai‘i Rules of Civil Procedure (HRCP) Rule 69, which provides in relevant part:

Process to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise. The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in the manner provided by the law of the State.

Id. “[E]xecution proceedings are continuations of merits proceedings, not new lawsuits.” *Bank Markazi v. Peterson*, 578 U.S. 212, 233 n. 26 (2016). “Executory process remedies are State created and State-supervised. The full power of the State, exercised through its clerks, judges, and sheriffs, is marshalled behind the creditor to achieve a judicial sale.” *Bonner v. B-W Utilities, Inc.*, 452 F. Supp. 1295, 1300 (W.D. La. 1978).

Although reciting the applicable test for “state action” under the Fourteenth Amendments Due Process clause, the Spences admit the process used here was a judicial process. Spence app. at 11 (“the subject Property was sold via a judicial foreclosure[.]”). The execution sale extinguished Winn’s judgment lien.

According to the Spences, because HRS § 651-1(c) allows an independent process server as an alternative to the sheriff or local law enforcement to execute the writ issued by the circuit court, there is no “state action” because the judicial process is rather a private matter. This is incorrect.

“[Due process] extend[s] to all acts of the state, whether through its legislative, its executive,

or its judicial authorities.” *Scott v. McNeal*, 154 U.S. 34, 45 (1894). A execution sale necessitates an act by the State judiciary. The U.S. Supreme Court held:

The judicial action in each case bears the clear and unmistakable imprimatur of the State. . . . State action, as that phrase is understood for the purposes of the Fourteenth Amendment, refers to exertions of state power in all forms. And when the effect of that action is to deny rights subject to the protection of the Fourteenth Amendment, it is the obligation of this Court to enforce the constitutional commands.

Shelley v. Kraemer, 334 U.S. 1, 20 (1948). The mere fact that a civil process server does not become a State official by execution of their duties to serve documents does not remove the imprimatur of State action from the judicial foreclosure.

The Spences fail to raise error on the part of the ICA, grave or otherwise.

II. CONCLUSION

Based on the foregoing, Appellants respectfully request that this Court deny the Spences’ application for writ of certiorari.

DATED: Makawao, Hawai’i

April 4, 2024

/s/ Lance D. Collins

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was duly served on the following parties via electronic filing (JEFS):

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