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CAAP-16-0000669

IN THE INTERMEDIATE COURT OF APPEALS

STATE OF HAWAII

In the Matter of the Estate

of

CARY THORNTON,

Deceased.

) P. No. 13-1-0360
) (Probate)
)
) APPEAL FROM THE
) A) ORDER DENYING INTERESTED
) PARTY JAMES HALL'S MOTION TO
) REMOVE SPECIAL ADMINISTRATOR
) AND TO SURCHARGE HIM FOR
) DAMAGES TO THE ESTATE FILED
) JUNE 2, 2016, filed August 4, 2016;
)
) [Caption Continued on Next Page]
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)
)

RESPONDENT-APPELLEE RANDALL YEE'S ANSWERING BRIEF

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) B) JUDGMENT ON THE ORDER
) DENYING INTERESTED PARTY JAMES
) HALL'S MOTION TO REMOVE SPECIAL
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) FILED JUNE 2, 2016, filed September 9, 2016
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TABLE OF CONTENTS

	<u>Page(s)</u>
I. INTRODUCTION	1
II. COUNTERSTATEMENT OF THE CASE.....	1
III. STANDARD OF REVIEW	4
IV. ARGUMENT	5
A. The Probate Court Properly Exercised His Statutory Authority to Refuse to Remove Yee as Special Administrator Regardless of Whether BANA Provided Actual Notice to Hall of the Hearing on the Original Petition.	5
B. The Probate Court’s Decision Not to Remove Yee As Special Administrator Was a Proper Exercise of Its Jurisdiction.....	8
V. CONCLUSION.....	10

TABLE OF AUTHORITIES

	<u>Page(s)</u>
CASES	
<i>Bank of Hawai'i v. Shinn</i> , 120 Hawai'i 1, 200 P.3d 370 (2008)	4, 10
<i>Coll v. McCarthy</i> , 72 Haw. 20, 804 P.2d 881 (1991)	4
<i>In re Estate of Marcos</i> , 88 Hawai'i 148, 963 P.2d 1124 (1998).....	5, 7
<i>Korean Buddhist Dae Won Sa Temple of Hawaii v. Sullivan</i> , 87 Hawai'i 217, 953 P.2d 131 (1998).....	4-5
<i>Metcalf v. Investors Equity Life Ins. Co.</i> , 80 Hawai'i 339, 910 P.2d 110 (1996).....	7
<i>Rosa v. CWJ Contractors, Ltd.</i> , 4 Haw. App. 210, 664 P.2d 745 (1983).....	6
<i>Roxas v. Marcos</i> , 89 Hawai'i 91, 969 P.2d 1209 (1998).....	6
<i>Sandy Beach Defense Fund v. City Council of Honolulu</i> , 70 Haw. 361, 773 P.2d 250 (1989).....	9
<i>Sherrill v. Estate of Pico</i> , 2014 Haw. App. LEXIS 547 at *15, 134 Hawai'i 305, 339 P.3d 1106 (App. 2014)	7
<i>Troyer v. Adams</i> , 102 Hawai'i 399, 77 P.3d 83 (2003)	4
STATUTES	
HRS § 560:1-201	5, 6
HRS § 560:1-302(a)(1)	8
HRS § 560:1-401(a)(3)	7, 9
HRS §560:3-403(b).....	2
HRS § 560:3-611	5, 7
HRS § 560:3-611(b).....	5, 8
HRS § 560:3-618	5
HRS § 560:3-803	7

OTHER AUTHORITIES

31 Am. Jur 2d, *Executors and Administrators* § 373..... 8

RULES

HRAP Rule 28(b)(4)..... 3

Hawai`i Probate Rule 3..... 1

RESPONDENT-APPELLEE RANDALL YEE'S ANSWERING BRIEF

I. INTRODUCTION

On January 22, 2014, Respondent-Appellee Randall Yee (“Yee”) was appointed Special Administrator of the Estate of Cary Thornton (“Thornton Estate”) as a result of a petition filed in Probate Court by Respondent-Appellee and interested party Bank of America, N.A., successor by merger to BAC Home Loans Servicing, LP fka Countrywide Home Loans Servicing, LP (“BANA”). More than two years later, on June 2, 2016, Petitioner-Appellant James Hall (“Hall”) filed a “motion” in Probate Court to remove Yee as Special Administrator.¹ That motion was denied by the Probate Court, and a judgement entered therein.

Hall has appealed that denial, claiming in his opening brief that he is an interested party in the Thornton Estate and that because he did not get notice of the 2014 petition filed to appoint Yee as Special Administrator, Yee should be removed since he lacks statutory authority to proceed as Special Administrator and the probate court lacked jurisdiction to appoint Yee. Hall is wrong. He was not an interested party, and removal of the Special Administrator is not otherwise required.

II. COUNTERSTATEMENT OF THE CASE

On July 31, 2012, Cary Thornton passed away. [Record on Appeal “ROA” at 17].² On June 4, 2013, BANA – a creditor of Mr. Thornton who had begun a foreclosure action on Mr. Thornton’s property located at 559 Kumukahi Place, Honolulu, Hawai`i -- filed a Petition

¹ The motion was improperly filed. In Probate Court, a proceeding is initiated by filing a petition, not a motion. *See* Hawai`i Probate Rule 3.

² All references to the Record on Appeal refer to the PDF page numbers.

for Appointment of Special Administrator in Probate Court (hereinafter “Petition”), seeking the appointment of a Special Administrator for Mr. Thornton’s estate. [ROA at 12-23].

In this Petition, BANA listed Wayne E. Thornton as “Father” and Shirley Coombs as “Mother” and also listed Hall as “Grantee of Power of Attorney.” [ROA at 13]. BANA provided notice of the Petition to all unknown person and known persons whose addresses are unknown who have any interest in the petition by publication in accordance with HRS §560:3-403(b). [ROA at 26]. In the Petition, BANA asked that Yee be appointed as the Special Administrator. [ROA at 13].

The Petition was granted and, by Order filed on January 22, 2014, Yee was appointed as Special Administrator. [ROA at 33-34]. On February 18, 2014, the Probate Court issued Letters of Special Administration for Yee. [ROA at 37-38]. Thereafter, on July 22, 2014, Hall, claiming to be an “Interested Party”, filed a request with the Circuit Court to inspect the record and obtained copies of documents. [ROA at 40]. On October 7, 2015, Hall filed a second request with the Circuit Court to inspect the record and obtained a copy of the Petition. [ROA at 42].

On June 6, 2016, Hall instigated his own Probate Court action, filing his “Motion to Remove Special Administrator and Surcharge Him for Damages to the Estate.” [ROA at 43-97]. In this Motion, Hall claimed, among other things, that Yee failed to notify “all interested parties as required by the Probate Code, specifically Mr. Hall and the Decedent’s two children” so that the appointment was void *ab initio*. [ROA at 47-48]. To support his claim that he was an “interested party”, Hall submitted a declaration claiming that the judge in the foreclosure action had “ordered counsel to start a probate action before the foreclosure case could continue and ordered the two attorneys to include [him] in the probate action.” [ROA at 50]. Hall continued on to assert that these unnamed attorneys had taken his “contact information and assured [him]

that [he] would be served with any future actions in Probate Court.” [ROA at 51]. After relaying his interaction with the alleged children of the decedent, Hall stated that he had moved into the property and spent \$100,000 of his own money to “maintain” it. [ROA at 51].³

Yee submitted an opposition to Hall’s motion, pointing out that Hall had not shown he was an interested party when the Petition for Appointment of Special Administrator was filed, that Yee had no obligation to provide Hall with notice of Yee’s own appointment, and that the Probate Code did not require removal of the Special Administrator absent a showing of intentional misrepresentation of material facts in the proceedings leading to Yee’s appointment as Special Administrator. [ROA at 109-134]. BANA also submitted a reply to Hall’s Motion, pointing out that Hall had not provided proof that he was an interested party in the Thornton estate. [ROA at 135-139].

At the hearing on the Motion, Hall’s counsel did not argue or explain anything further regarding any claim that the judge in the foreclosure proceeding had required notice to be provided to Hall in any probate proceeding. Instead, Hall’s counsel volunteered that Hall would “waive any payment to him because he . . . was a part of this decedent’s life.” [7/14/17 Transcript at p. 10, lines 2-3]. While improperly claiming that Yee acknowledged Hall to be an interested party, Hall’s counsel could not explain the significance of Hall’s identification in the Petition as “grantee of power of attorney” with respect to any claimed status by Hall as an interested party. [7/14/17 Transcript at p. 13, line 16 to p. 14, line 2].

In turn, the Probate Court noted that Hall’s position that he was an interested party, did not require naming him (as opposed to Yee) as the Special Administrator. [7/14/17 Transcript at

³ Hall continued on to assert his belief that, as Special Administrator, Yee has not opposed foreclosure efforts as Hall would like to have done. However, as he has not raised these points in his appeal, they are not addressed in this Answering Brief. *See* HRAP Rule 28(b)(4).

p. 7, lines 19-19]. The Probate Court further pointed out that any notice issued had been cured as there had been notice by publication and that Hall apparently knew that Yee was the Special Administrator since Hall had participated in other proceedings. [7/14/17 Transcript at p. 18, line 15 to p. 19, line 1].

At the conclusion of the hearing, the Probate Court denied Hall's Motion. On August 4, 2016, the Order denying the Motion was entered [ROA at 140-41], and on September 9, 2016, the Judgment on the Order was entered. [ROA at 145-46]. This appeal followed.

III. STANDARD OF REVIEW

Whether the Probate Court properly refused to remove Yee as the Special Administrator because Hall was not notified of the hearing on the original Petition to Appoint Special Administrator presents a mixed question of law and fact, which is subject to a clearly erroneous standard of review. *Coll v. McCarthy*, 72 Haw. 20, 28, 804 P.2d 881, 887 (1991). "A finding is clearly erroneous where the court is left with a firm and definite conviction that a mistake has been committed." *Id.*

Yee agrees with Hall that whether the Probate Court's decision to appoint Yee as the Special Administrator violated Hall's procedural due process rights is reviewed under an abuse of discretion standard. *Troyer v. Adams*, 102 Hawai'i 399, 434, 77 P.3d 83, 118 (2003).

Finally, even if Hall should have been provided with notice prior to the hearing on the original Petition and even if the lack of notice could be said to constitute a violation of procedural due process rights, the Probate Court's decision is affirmed if the error is deemed harmless. *See Bank of Hawai'i v. Shinn*, 120 Hawai'i 1, 3, 200 P.3d 370, 372 (2008) ("[A]lthough the failure to provide notice . . . to a party in default is error, such error was harmless under the circumstances of this case."); *Korean Buddhist Dae Won Sa Temple of*

Hawaii v. Sullivan, 87 Hawai'i 217, 245, 953 P.2d 1315, 1343 (1998) (due process violation deemed harmless error).

IV. ARGUMENT

A. **The Probate Court Properly Exercised His Statutory Authority to Refuse to Remove Yee as Special Administrator Regardless of Whether BANA Provided Actual Notice to Hall of the Hearing on the Original Petition.**

To bring an action or petition seeking or contesting the appointment of a special administrator, the petitioner must show that he is an interested person. *See In re Estate of Marcos*, 88 Hawai'i 148, 157, 963 P.2d 1124, 1133 (1998) (petitioner who was not an interested person lacked standing to bring petition for appointment of special administrator). HRS § 560:1-201 defines an “interested person” to encompass “heirs, devisees, children, spouses or reciprocal beneficiaries, creditors, beneficiaries, and any others having a property right in or claim against a trust estate or the estate of a decedent It also includes persons having priority for appointment as personal representative, and other fiduciaries representing interested persons.”

Once, the petitioner establishes that he or she is an interested person, the petitioner can file a petition to remove a special administrator, at which time he or she must show cause for removal under HRS § 560:3-611, which is made applicable to special administrators by HRS § 560:3-618. This requires that the petitioner show that removal would be in the best interest of the estate or that the “[special] representative or the person seeking the [special] representative’s appointment intentionally misrepresented material facts in the proceedings leading to the appointment, or that the [special] representative has disregarded an order of the court, or has become incapable of discharging the duties of the office, or has mismanaged the estate or failed to perform any duty pertaining to the office.” HRS § 560:3-611(b).

In arguing his first point of appeal, Hall does not directly assert that he is an interested person in the Thornton estate. Instead, he claims that “[t]he special administrator” listed Hall as an interested person as instructed to do so by [the foreclosure judge].” Opening Brief at p. 7. He continues on to argue that having done so, the special administrator is precluded by “judicial estoppel” from disputing that Hall’s status as an interested person. *Id.* Hall then concludes by citing several cases involving procedural due process notice and hearing issues without any explanation as to how that relates to whether the Probate Court properly exercised its statutory authority. *Id.* at pp. 8-9.

Initially, it must be noted that Yee did not list Hall as an interested person because Yee did not file the original Petition; BANA filed it.

In any event, Hall cannot show that, at least as of the time the original Petition was filed, he was an “interested person” under HRS § 560:1-201. BANA has explained that when it filed the original Petition, it named Hall “due to his appearances made in the underlying foreclosure action.” [ROA at 136]. In the Petition, BANA named Hall as “Grantee of Power of Attorney.” [ROA at 13]. The identification of Hall as a “Grantee of Power of Attorney” does not establish Hall as an interested person.⁴ Further, to the extent that Hall is claiming that he was an interested person as a creditor of the estate, even though this was never disclosed to BANA, notice was

⁴ Hall claim of “judicial estoppel” is meritless. Judicial estoppel prevents a party from maintaining “inconsistent positions or to take a position in regard to a matter which is directly contrary to, or inconsistent with, one previously assumed by him, at least where he had, or was chargeable with, full knowledge of the facts, and another will be prejudiced by his action.” *Roxas v. Marcos*, 89 Hawai‘i 91, 124, 969 P.2d 1209, 1242 (1998) (quoting *Rosa v. CWJ Contractors, Ltd.*, 4 Haw. App. 210, 218, 664 P.2d 745, 749 (1983)). Here, identifying Hall as Grantee of Power of Attorney is not inconsistent with disputing his claim to be an “interested person”, and there certainly is no legal prejudice to Hall as he cannot show that he relied on this identification in any way.

provided to him via publication. Under, HRS § 560:1-401(a)(3), notice by publication provides effective notice to all persons who may claim to be interested persons but whose identify or location are unknown to the petitioner.⁵

At the hearing on Hall's motion, the Probate Court was willing to consider that Hall might now be a creditor based on his declaration attached to his Motion to have paid \$100,000 to maintain the Property and to have seen a will or other document with his name on it. However, there is no showing that these allegations were known to BANA at the time it filed its Petition. In fact, they were apparently not known since BANA named Hall solely as "Grantee of Power of Attorney." [ROA at 13].⁶

Moreover, even if one assumes that Hall was an interested person entitled to notice prior to the filing of the original Petition, the Probate Code does not mandate that failure to provide notice requires Yee's removal as Special Administrator. As noted above, HRS § 560:3-611 governs the procedure an interested person must follow to remove a special administrator. The interested person must establish cause for removal, by showing that removal would be in the best interest of the estate or that the "[special] representative or the person seeking the [special]

⁵ Hall argues that he is aware that the decedent had two children who should have received notice of the Petition. However, Hall lacks standing to raise the absence of notice to the children as a basis for his opposition to the appointment of Yee as Special Administrator. *See In re Estate of Marcos*, 88 Hawai'i at 158, 963 P.2d at 1134 (appellant who was not an interested person lacked standing to petition for appointment of special administrator); *Sherrill v. Estate of Pico*, 2014 Haw. App. LEXIS 547 at *15, 134 Hawai'i 305, 339 P.3d 1106 (App. 2014) (mother lacked standing in probate court to raise adult daughters' claims as beneficiaries of decedent's estate). *See also Metcalf v. Investors Equity Life Ins. Co.*, 80 Hawai'i 339, 340, 910 P.2d 110, 111 (1996) (parent company lacked standing to raise procedural due process claims on behalf of its subsidiary).

⁶ Hall presented no further information on any claim to being a creditor. However, given that Thornton passed away in 2012, any claim to be a creditor would appear to be barred by the statute of limitations. *See* HRS § 560:3-803.

representative's appointment intentionally misrepresented material facts in the proceedings leading to the appointment or that the [special] representative has disregarded an order of the court, or has become incapable of discharging the duties of the office, or has mismanaged the estate or failed to perform any duty pertaining to the office." HRS § 560:3-611(b).

Hall does not argue or show that Yee's removal as Special Administrator would be in the best interest of the Thornton estate or that either Yee or BANA intentionally misrepresented any facts in the proceedings leading to Yee's appointment or that Yee otherwise violated HRS § 560:3-611(b). Hall simply argues that he was not provided notice of the hearing on the Petition. Under these circumstances, even if Hall could qualify as an interested person, he has failed to establish cause for Yee's removal.⁷

B. The Probate Court's Decision Not to Remove Yee As Special Administrator Was a Proper Exercise of Its Jurisdiction.

Hall claims that the Probate Court lacked personal and subject matter jurisdiction to proceed. He does not explain why subject matter jurisdiction is lacking. Clearly, Probate Court has subject matter jurisdiction over the issue of whether or not to remove a special administrator of an estate. *See* HRS § 560:1-302(a)(1). It thus appears that Hall has confused subject matter with personal jurisdiction.

Hall's personal jurisdiction claim is that he is an interested person of the Thornton estate and therefore should have received notice of the hearing on the original petition and that the

⁷ In his counsel's declaration attached to the Motion, but not on appeal, Hall argued that Yee, on the estate's behalf, should have raised certain defenses to the foreclosure proceeding. In his Opposition, Yee pointed out that that the estate representative is not obligated "to defend against a valid and collectible claim." 31 Am. Jur 2d, *Executors and Administrators* § 373, and that Hall had not shown that any of the issues referenced in his counsel's declaration would be meritorious defenses that would preclude foreclosure or that the Special Administrator had acted unreasonably in not having raised them. [ROA at 112-13].

failure to provide him with notice violates his procedural right to due process as he did not attend the hearing. Initially, as noted above, Hall has not shown that as “Grantee of Power of Attorney” he was an interested person at the time the original Petition was filed. In addition, as noted above, to the extent that his later claims to be creditor would provide him with interested person status, which would have been unknown to BANA at the time the original Petition was filed, he received effective notice via publication. *See* HRS § 560:1-401(a)(3).

In addition, even if Hall could be deemed to be an interested person, he was not denied constitutional due process. Whether a party’s due process right to notice and a hearing has been violated involves a two-step analysis: “(1) is the particular interest which claimant seeks to ‘protect’ by a hearing ‘property’ within the meaning of the due process clauses of the federal and state constitutions, and (2) if the interest is ‘property,’ what specific procedures are required to protect it.” *Sandy Beach Defense Fund v. City Council of Honolulu*, 70 Haw. 361, 376, 773 P.2d 250, 260 (1989).

As to the first step, Hall’s interest in the estate appears to be as a creditor – someone who allegedly spent money to maintain the Property – which presumably is some sort of quantum meruit claim against the estate. This would seem to be his protectable due process interest (though likely barred by the statute of limitations).

However, Hall cannot satisfy the second step. There is no showing that the procedure utilized – a hearing to appoint a special administrator in which Hall was notified by publication – compromised his claim against the estate. After Yee was appointed Special Administrator, Hall was not divested of his property interest. If he had any claim against the estate, it was not taken away or lost because Yee was appointed Special Administrator. Moreover, Hall was able to

obtain a hearing, via the filing and hearing on his Motion, in which he had full and fair opportunity to argue why he and not Yee should be the Special Administrator. There simply is no due process violation.

Finally, even if there could have been a due process violation – which there was not --, the violation is harmless error. As can be seen by his accessing the entire court record in this matter on July 22, 2014 [ROA at 40], Hall knew full well that Yee had been appointed as Special Administrator within 5 months of the hearing on the original Petition. By the time he filed his Motion, Hall had allowed nearly two years to elapse. Nothing precluded him from filing his Motion much earlier, but, in fact, it would have made no difference. The Probate Court was clear that whether Hall was present at the hearing on the original Petition would not change its mind, and the result would be the same. The situation is similar to *Bank of Hawai`i v. Shinn*, in which the Supreme Court held that a party who was not notified of a motion to extend a judgment against him (and thus did not attend the hearing granting the motion) lacked grounds to reverse the granting to the motion because he failed to show prejudice since “the outcome would have been the same.” 120 Hawai`i at 11, 200 P.3d at 380. In the same fashion, regardless of whether Hall attended or did not attend the hearing on the original Petition, the outcome would have been the same.

V. CONCLUSION

For the reasons stated above, Respondent-Appellee Randall Yee respectfully requests that the Intermediate Court of Appeals affirm the Probate Court’s Order Denying Interested Party James Hall’s Motion to Remove Special Administrator and to Surcharge Him for Damages to the

Estate filed June 2, 2016, and the Judgment on the Order Denying Interested Party James Hall's Motion to Remove Special Administrator and to Surcharge Him for Damages to the Estate filed June 2, 2016.

DATED: Honolulu, Hawai'i; July 10, 2017.

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)	

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date a copy of the foregoing will be duly served upon the following persons by either electronically through the Hawai'i Judiciary Electronic Filing and Service System (JEFS), hand delivery or via U.S. mail, postage prepaid, as indicated below at their last known address as shown below:

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