ORIGINAL

1ST CIRCUIT COURT
STATE OF HAWAII
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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

SCHNITZER STEEL HAWAII CORP., a Delaware corporation,

Plaintiff,

vs.

ISLAND RECYCLING INC., a Hawaii corporation, HAWAII STATE DEPARTMENT OF HEALTH, VIRGINIA PRESSLER, M.D., in her official capacity as Director of Health, and DOE ENTITIES 1-10,

Defendants.

Civil No. 14-1-2195-10 ECN
(Declaratory Judgment)

DEFENDANTS HAWAII STATE DEPARTMENT OF HEALTH and VIRGINIA PRESSLER, M.D.'S MEMORANDUM IN REPLY TO PLAINTIFF'S MEMORANDUM, FILED ON SEPTEMBER 21, 2015, IN OPPOSITION TO DEFENDANTS HAWAII STATE DEPARTMENT OF HEALTH AND VIRGINIA PRESSLER, M.D.'S SUBSTANTIVE JOINDER IN DEFENDANT ISLAND RECYCLING, INC.'S MOTION FOR SUMMARY JUDGMENT RE: DRAINAGE DITCH CLAIMS; CERTIFICATE OF SERVICE

Hearing
Date: September 29, 2015
Time: 10:30 a.m.
Judge: Honorable Edwin C. Nacino

Trial Date: None

DEFENDANTS HAWAII STATE DEPARTMENT OF HEALTH and VIRGINIA PRESSLER, M.D.'S MEMORANDUM IN REPLY TO PLAINTIFF'S MEMORANDUM, FILED ON SEPTEMBER 21, 2015, IN OPPOSITION TO DEFENDANTS HAWAII STATE DEPARTMENT OF HEALTH AND VIRGINIA PRESSLER, M.D.'S SUBSTANTIVE JOINDER IN DEFENDANT ISLAND RECYCLING, INC.'S MOTION FOR SUMMARY JUDGMENT RE: DRAINAGE DITCH CLAIMS

Defendants Hawaii State Department of Health ("DOH") and Virginia Pressler, M.D., in her official capacity, (hereinafter collectively referred to as the "State"), by and through their attorneys, Douglas S. Chin, Attorney General of Hawaii, and Caron Inagaki, Marie Manuele Gavigan and Dana M. Barbata, Deputy Attorneys General, submit this memorandum in reply to Plaintiffs' Memorandum, filed on September 21, 2015, in opposition to the State's Substantive Joinder, filed on September 2, 2015, to Defendant Island Recycling, Inc.'s motion for summary judgment re: drainage ditch claims, filed on September 1, 2015.

I. INTRODUCTION

Plaintiff, Schnitzer Steel Hawaii Corp., (hereinafter "Plaintiff"), has instituted this civil litigation against Defendant, Island Recycling Inc., (hereinafter "Island" or "IRI"), one of Plaintiff's main competitors in the City and County of Honolulu, and the State. Plaintiff's claims against the State are contained in Count 2 of its First Amended Complaint, and assert that the State is not enforcing the clean water law (i.e., Hawaii Revised Statutes ("HRS"), Chapter 342D) against IRI nor properly regulating IRI's business. Therefore, Plaintiff has filed the instant civil action seeking to take over DOH's regulatory responsibility and put IRI out of business. While Plaintiff's opposition to the State's substantive joinder ("State's motion") in IRI's motion for summary judgment asserts that DOH is making "blatant efforts to obfuscate the facts and law," its opposition is yet another attempt to cast aspersions on DOH so that Plaintiff can take over DOH's regulatory authority and regulate IRI in the manner that Plaintiff wants. Following are examples of Plaintiff's disparagement of DOH in its opposition memorandum:

- "...DOH has not taken appropriate enforcement action against IRI for its violations." (Plaintiff's Memo in Opposition to the State's motion ("MIO"), page 6)

- "Despite this suit, DOH has continued to refuse to do its job and is creating bad public policies by taking the positions in this case that are designed simply to cover itself." (Plaintiff's MIO, page 7)

- "...DOH's position that it need not test samples from the drainage ditch to ascertain the extent of the pollution shows its blatant disregard for its legislative mandate and a complete failure at *enforcing* any violations." [footnote omitted] (Plaintiff's MIO, page 10)

- "The efforts that DOH is willing to go to justify its failure to act are staggering, and exemplify why review of the facts by this neutral tribunal is necessary." (Plaintiff's MIO, page 12)

II. ARGUMENT

Plaintiff asserts three arguments in opposition to the State's motion: (1) that DOH, by joining IRI's motion has therefore adopted the positions advanced by IRI, (2) DOH "concedes its jurisdiction to regulate the drainage ditch," and (3) that DOH's position "that the drainage ditch is not 'State Waters' is internally inconsistent and contradicts the evidence." Each of Plaintiff's positions will be addressed herein.

A. DOH's Motion Should Be Considered on Its Own Merits

The State filed a substantive joinder in IRI's motion for summary judgment and requested that this Honorable Court grant its substantive joinder and "enter judgment in favor of the State on all claims in Count II" of Plaintiff's First Amended Complaint. Plaintiff, in its opposition, misconstrues the State's motion. The State did not incorporate by reference all of IRI's arguments as set out in IRI's motion. Rather, the State joined in the **request** made by IRI in its motion, i.e., that this Court rule that the unpaved easement area (characterized by Plaintiff as the "drainage ditch") on IRI's property is not a "state water." As the basis for the request in its motion, the State set out its own grounds and reasoning for its request.

Plaintiff perhaps does not understand the purpose of a "joinder" or a "substantive joinder" in another motion. While there is no Hawaii case law on the subject, there is guidance from the federal court. A "joinder" in a motion is basically an agreement by the joining party that the moving party be granted the relief that it requests. A "substantive joinder" is a request by a party to be given the same relief that the original moving party has requested, but for the reasons stated in the joining party's memorandum. Rule 7.9 of the Local Rules of Practice for the United States District Court for the District of Hawaii discusses "substantive joinder" and "joinder." *See also, Island Group, Inc. v. SwimWays Corp.*, 954 F.Supp.2d 1045, 1060, n. 4 (D.Haw. 2013). The State's motion specifically set out the reasons why it was seeking the same relief that IRI sought in its motion. Clearly, the State's motion contained its own reasons, based on its role as regulator, and did not rely on the reasoning put forth by IRI in its motion. By asserting that DOH's substantive joinder is allowing IRI to "make up the rules," Plaintiff attempts to bolster its argument that it should be allowed to be the regulator of IRI. Plaintiff's argument is nothing more than a "red herring."

B. DOH Jurisdiction of the So-called "Drainage Ditch"

Plaintiff, in Section B of its MIO, asserts that "DOH plainly concedes that it has the authority to regulate the drainage ditch on IRI's property," but then appears to argue that DOH is not doing its job because the so-called drainage ditch is a state water, and DOH has not required IRI to dig out the existing soil and fill in the ditch with new, clean soil. Plaintiff MIO, pages 9-10. Again, the issue before the Court is whether this unpaved easement in question is a "state water." Plaintiff has concluded that it is a state water, based on potential rather than reality. Therefore, Plaintiff is the one who is using this motion to argue the merits of its claims contained in Count 2 of the First Amended Complaint.

Plaintiff's reliance on a recent (May 15, 2015) DOH news release to again disparage DOH is also misplaced. Plaintiff's MIO, page 10, n.6, and Exhibit DD to Plaintiff's Memo in Opposition to IRI's motion. It is clear from a reading of this press release that the Aiea drainage ditch in question is completely different than the unpaved easement on IRI's property, as the Aiea ditch is a drainage ditch that actually drains water into a State water. The press release notes that there were dead fish in the drainage ditch, and DOH was able to take water from that ditch for testing. Clearly, the Aiea situation is completely different than the unpaved easement on IRI's property.

C. DOH's Position on This Unpaved Easement

Plaintiff's MIO, starting at page 12, takes yet another opportunity to disparage DOH in its work. DOH stands by its position that this unpaved easement on IRI's property that is the subject of these motions is not necessarily a "state water." DOH's position is based upon the facts and evidence in this case, i.e., (1) that there is no flowing water in this easement, (2) that at the end of the channel, there is a large sand berm, at a higher gradient than the ditch, which would prevent storm water flows from reaching the ocean, and (3) that there is no evidence that any water in this channel has entered the ocean. Plaintiff asserts that the easement area on IRI's property and the channel makai of Kaomi Loop drain into the ocean, however, there simply is no evidence of that, and DOH has presented evidence to the contrary. While Plaintiff has submitted photographs that it asserts shows water in the subject area, those photographs are blurry, and there is no way to identify exactly where those photographs were taken or what they depict. These photographs are not admissible evidence as there is no proper foundation for their admission. Thus, they do not preclude the grant of the State's motion.

In addition, Plaintiff seems to dispute that the channel makai of Kaomi Loop ends at a sand berm prior to reaching the ocean, and goes on to assert that "the 'sand berm' referenced in

DOH's Joinder is simply the beach itself." In its opposition to Plaintiff's motion for summary judgment, the State submitted a photograph of where this sand berm is located and also a photograph showing the high water mark of the ocean. State's Memorandum in Opposition to Plaintiff's motion for summary judgment, Exhibits "A" and "B." It is clear that the sand berm is located mauka of the high water mark of the ocean. Plaintiff also asserts that "DOH does not provide any evidence or reasoning why the sand on the beach would prevent runoff or percolation into the ocean at high tide or otherwise." Ms. Tanimoto's Declaration (Exhibit "C" to the State's Opposition to Plaintiff's motion for summary judgment) does address this matter, in that she testifies that the sand berm is at a higher gradient than the ditch and would prevent hypothetical storm water flows from reaching the ocean. *Id.* at paragraph 5.

Although Plaintiff asserts that the State has failed to provide admissible evidence to support its arguments, it is, in fact, Plaintiff who has not submitted admissible evidence to support its position.

III. CONCLUSION

As the State has asserted in prior pleadings, Plaintiff has invested significant time and resources on this litigation by spying on IRI[1], and then using the results of its spying to complain to DOH that IRI is violating the environmental laws. Plaintiff is using this litigation to attempt to usurp DOH's regulatory and enforcement authority of the State's environmental laws. However, Plaintiff's litigation has had the harmful effect of taking valuable time from DOH's enforcement activities so that it can defend itself against this baseless litigation.

[1] Schnitzer has repeatedly produced photographs, purportedly of IRI and surrounding areas, obtained by a helicopter fly-over.

For the reasons stated in the State's Substantive Joinder and for the reasons stated herein, the State respectfully requests that this Honorable Court grant its motion and rule that the unpaved easement on IRI's property is not a "state water."

DATED: Honolulu, Hawaii, September 24, 2015.

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Deputy Attorneys General

Attorney for Defendants
HAWAII STATE DEPARTMENT OF HEALTH AND VIRGINIA PRESSLER, M.D., in her official capacity