UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

VIRGIL E. DAY, et al., Plaintiffs, and WENDELL MARUMOTO, Plaintiff-Intervenor-Appellant,	No. 08-16668 D.C. No. 1:05-CV-00649 SOM-BMK ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAI`I HONORABLE SUSAN OKI MOLLWAY

[CAPTION CONTINUED ON NEXT PAGE]

APPELLEES OHA DEFENDANTS' ANSWERING BRIEF

CERTIFICATE OF SERVICE

McCORRISTON MILLER MUKAI MACKINNON LLP

ROBERT G. KLEIN 1192-0
LISA W. CATALDO 6159-0
LISA MARIE EZRA 8689-0
Five Waterfront Plaza, 4th Floor
500 Ala Moana Boulevard
Honolulu, Hawai`i 96813
Tel. No.: 808-529-7300 Fax No.: 808-524-8293
klein@m4law.com; cataldo@m4law.com; ezra@m4law.com

Attorneys for Defendants-Appellees Haunani Apoliona, Walter M. Heen, Rowena Akana, Donald B. Cataluna, Robert K. Lindsey, Jr., Colette Y. Machado, Boyd P. Mossman, Oswald K. Stender and John D. Waihe`e IV in their official capacities as trustees of the Office of Hawaiian Affairs

v.)
)
HAUNANI APOLIONA, et al.)
)
Defendants-Appellees,)
)
and)
)
STATE OF HAWAI`I,)
)
Defendant-Intervenor-Appellee.)
_________________________________)

TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. JURISDICTIONAL STATEMENT 2

III. ISSUES PRESENTED FOR REVIEW 3

IV. STATEMENT OF THE CASE 4

V. SUMMARY OF ARGUMENT 6

VI. STANDARD OF REVIEW 7

VII. ARGUMENT 7

A. Marumoto Was Not a Party to the Underlying Case and May Only Appeal the Determination that His Motion to Intervene is Moot 7

B. Even if Marumoto's Appeal Could Be Construed as an Appeal of the Denial of the Motion to Intervene Based Upon the Merits of that Motion, the Summary Judgment Order's Holding Should be Affirmed Because Marumoto Has No Right to Intervene 8

1. Marumoto's Motion to Intervene Was Untimely 8

2. Marumoto's Interests Have Not Been and Will Not be Impaired 11

C. The Second and Third Issues Presented for Review are Beyond the Scope of this Appeal 12

VIII. CONCLUSION 13

TABLE OF AUTHORITIES

Page

Federal Cases

Arakaki v. Cayetano,
324 F.3d 1078 (9th Cir. 2003) 7

California Dep't of Toxic Substances Control v. Commercial
Realty Projects, Inc., 309 F.3d 1113 (9th Cir. 2002) 7, 8, 9, 11

Disabled Rights Action v. Las Vegas Events,
375 F.3d 861 (9th Cir. 2004) 12

Greenwood v. FAA,
28 F.3d 971 (9th Cir. 1994) 4

Harkins Amusements Enters., Inc. v. Gen. Cinema Corp.,
850 F.2d 477 (9th Cir. 1988) 3

Hunter v. Dep't of the Air Force Agency,
846 F.2d 1314 (11th Cir. 1988) 2, 8, 12

Indep. Towers of Washington v. Washington,
350 F.3d 925 (9th Cir. 2003) 4

Retired Chicago Police Ass'n v. City of Chicago,
7 F.3d 584 (7th Cir. 1993) 2, 7, 12

Schonfeld v. City of New York,
14 Fed. Appx. 128 (2d Cir. 2001) 10

Southern California Edison Co. v. Lynch,
307 F.3d 794 (9th Cir. 2002) 2, 7

United States v. City of Chicago,
870 F.2d 1256 (7th Cir. 1989) 2, 7, 12

United States v. Elias,
921 F.2d 870 (9th Cir. 1990) 3

United States v. State of Washington,
86 F.3d 1499 (9th Cir. 1996) 8

USA Petroleum Co. v. Atlantic Richfield Co.,
13 F.3d 1276 (9th Cir. 1994) 3, 13

Statutes

Admission Act of March 18, 1959, Pub. L. 86-3, 73 Stat. 4 (1959) 4

Hawaiian Homes Commission Act, 1920, Pub. L. No. 67-34,
42 Stat. 108 (1921) 4

APPELLEES OHA DEFENDANTS' ANSWERING BRIEF

I. INTRODUCTION

Defendants-Appellees Haunani Apoliona, Walter M. Heen, Rowena Akana, Donald B. Cataluna, Robert K. Lindsey, Jr., Colette Y. Machado, Boyd P. Mossman, Oswald K. Stender and John D. Waihe`e IV, in their official capacities as trustees of the Office of Hawaiian Affairs ("OHA Defendants"), respond to Wendell Marumoto's Opening Brief, filed October 30, 2008.

Appellant Wendell Marumoto ("Marumoto") appeals the District Court's determination that Citizen Wendell Marumoto's Notice and Motion to Intervene, filed June 16, 2008 ("Motion to Intervene," Excerpts of Record ("ER") 3) was rendered moot by operation of the District Court's order of summary judgment of all remaining claims and parties. Marumoto cannot prevail in his appeal because, as an unsuccessful movant for intervention, Marumoto has never been a party to this litigation, and he therefore lacks standing to appeal the order. Even if this Court found that jurisdiction over the appeal exists, the Court should nevertheless affirm the District Court's order because Marumoto cannot satisfy this Court's test for intervention of right. Finally, the substantive arguments made in Marumoto's Opening Brief were never at issue in the court below, and are not properly raised in the appeal.

II. JURISDICTIONAL STATEMENT

Marumoto was never a party to this case, so he has no standing to appeal the Order Granting Second Motion for Summary Judgment, filed June 20, 2008 ("Summary Judgment Order," ER 2). One who moves unsuccessfully for intervention in a case remains a non-party to the case. See Southern California Edison Co. v. Lynch, 307 F.3d 794, 803 (9th Cir. 2002). Absent exceptional circumstances, a non-party has no standing to appeal the merits of a District Court's decision. See id. at 804 (A nonparty has no standing to appeal a district court's decision except in "exceptional circumstances"). Here, Marumoto has not alleged, much less demonstrated, exceptional circumstances. He therefore has standing, at most, to appeal the Summary Judgment Order's holding that his Motion to Intervene was moot; he has no standing whatsoever to otherwise appeal the merits of the Summary Judgment Order. See Retired Chicago Police Ass'n v. City of Chicago, 7 F.3d 584, 596 (7th Cir. 1993) (unsuccessful movants for intervention had standing only to appeal the order denying intervention, not an order regarding class certification); United States v. City of Chicago, 870 F.2d 1256, 1258 (7th Cir. 1989) (stating that until putative intervenors become parties "they cannot appeal from any order in the proceeding other than the denial of that motion"); Hunter v. Dep't of the Air Force Agency, 846 F.2d 1314, 1317 (11th Cir.

1988) (noting that "one who is denied permission to intervene in an action will not be in a position to take an appeal from the final judgment").

III. ISSUES PRESENTED FOR REVIEW

The only issue that could properly have been raised in this appeal—but was not—is whether the District Court correctly held that Marumoto's Motion to Intervene was rendered moot by the granting of summary judgment as to all remaining claims and parties. In contrast, at page 2 of the Opening Brief, Marumoto frames his first issue for review as "[w]hether [Marumoto] is entitled to intervene as of right." The District Court did not address this question, as the question had become moot by the time of the District Court's decision. The question therefore cannot properly be considered by this Court. On appeal, "[o]nly the record that was before the district court is normally considered." USA Petroleum Co. v. Atlantic Richfield Co., 13 F.3d 1276, 1279 (9th Cir. 1994) (citing Harkins Amusements Enters., Inc. v. Gen. Cinema Corp., 850 F.2d 477, 482 (9th Cir. 1988); United States v. Elias, 921 F.2d 870, 874 (9th Cir. 1990)).

The two remaining issues presented for review, as set out at page 2 of the Opening Brief, relate to the legality of distributions of trust income from the trust created by section 5(f) of the Hawai`i Admission Act. Because these issues have nothing to do with the limited scope of the sole issue that could properly have been presented, the issues cannot be addressed on appeal.

Consequently, there are no properly-noticed issues on appeal. The Court is also precluded from manufacturing a proper question. "Our circuit has repeatedly admonished that we cannot 'manufacture arguments for an appellant' and therefore we will not consider any claims that were not actually argued in appellant's opening brief." Indep. Towers of Washington v. Washington, 350 F.3d 925, 929 (9th Cir. 2003) (quoting Greenwood v. FAA, 28 F.3d 971, 977 (9th Cir. 1994)). Rather, we "review only issues which are argued specifically and distinctly in a party's opening brief." Id.

IV. STATEMENT OF THE CASE

On October 13, 2005, the Day plaintiffs filed their Complaint. See Docket (ER 12) at #1. The Day plaintiffs allege that they are "native Hawaiians," as defined under the Hawaiian Homes Commission Act, 1920, Pub. L. No. 67-34, 42 Stat. 108 (1921) and the Admission Act of March 18, 1959, Pub. L. 86-3, 73 Stat. 4 (1959)—that is, they describe themselves as having "not less than one-half part" Hawaiian blood—and as such are special beneficiaries of a trust imposed by the Admission Act. See ER 2 at pp. 4-7. The Day plaintiffs contend that the OHA Defendants, as trustees, have a duty to expend funds derived from the lands subject to the trust established by the Admission Act ("Ceded Lands Trust") solely for the betterment of the conditions of native Hawaiians, and that the OHA Defendants had breached that duty by spending Ceded Lands Trust funds for the betterment of

persons having any quantum of Hawaiian blood. See ER 2 at p. 4.

On August 10, 2006, after considering a number of motions and an amicus brief by the State of Hawai`i, the District Court entered its Order Dismissing Action ("Dismissal Order"). ER 12 (Docket) at 103.

Plaintiffs appealed the Dismissal Order to the Ninth Circuit and, on November 7, 2007, Marumoto's counsel, H. William Burgess, moved to intervene on behalf of six other "Non-Native Hawaiians" (the same people who are plaintiffs in the Kuroiwa v. Lingle case, Appeal No. 08-16769, discussed below) in the appeal, arguing that they are affected by the "misapplication" of the Ceded Lands Trust funds to benefit only those of native Hawaiian ancestry rather than all citizens of Hawai`i. See ER 11, at p. 168. On November 30, 2007, this Court denied that motion without prejudice to renewal before the District Court on remand. ER 9.

The case was remanded to the District Court on December 14, 2007. See ER 12 (Docket) at # 115. More than five months later, on May 29, 2008, counsel, again on behalf of the six "Non-Native Hawaiians," filed Plaintiffs' (Six Non-Ethnic Hawaiians') Notice of Motion to Consolidate Hearings and Briefings on Two Issues: "Standing" and "Expending Trust Funds for the Akaka Bill," seeking to consolidate hearings in this case and in the action they initiated, Kuroiwa v. Lingle, Civil No. 08-00153 JMS/KSC, then pending in the United States District

Court for the District of Hawai`i. ER 8. That motion was denied on May 30, 2008. ER 7.

On June 4, 2008, the State of Hawai`i filed its Motion for Summary Judgment. ER 5. Subsequently, on June 16, 2008, *more than six full months after the remand*, Marumoto moved to intervene in the instant action. ER 3. On June 20, 2008, the Court issued the Summary Judgment Order, disposing of all remaining claims and parties, and holding as moot Marumoto's Motion to Intervene. ER 2.

V. SUMMARY OF ARGUMENT

Marumoto's arguments on appeal are without merit. Marumoto's argument that he was entitled to intervene as of right disregards the fact that the Motion to Intervene was rendered moot by the Summary Judgment Order and, as a non-party, Marumoto has no standing to appeal. Even if the District Court's decision could be construed as an appealable denial of the Motion to Intervene, this Court lacks jurisdiction to entertain the appeal because Marumoto had no standing to intervene, based upon application of this Court's test for intervention as of right. Finally, the Court is precluded from addressing Marumoto's arguments on the merits because he has no standing to appeal as to those issues, and because those issues were not before the District Court.

VI. STANDARD OF REVIEW

Generally, the Ninth Circuit reviews *de novo* the denial of motion to intervene as of right. See California Dep't of Toxic Substances Control v. Commercial Realty Projects, Inc., 309 F.3d 1113, 1119 (9th Cir. 2002); Arakaki v. Cayetano, 324 F.3d 1078, 1082 (9th Cir. 2003). An exception to this standard is that the district court's determination of timeliness is reviewed for an abuse of discretion. California Dep't of Toxic Substances, 309 F.3d at 1119.

VII. ARGUMENT

A. Marumoto Was Not a Party to the Underlying Case and May Only Appeal the Determination that His Motion to Intervene is Moot

Marumoto has never been a party to this case, so is wholly without standing to appeal the merits of the Summary Judgment Order. Cf. Southern California Edison, 307 F.3d at 803. Marumoto has not alleged or presented evidence of "exceptional circumstances" that would theoretically permit him, as a non-party, to appeal the merits of the Summary Judgment Order. See id. at 804. Consequently, Marumoto has standing, at most, to appeal only the Summary Judgment Order's holding that his Motion to Intervene was moot; he has no standing whatsoever to otherwise appeal the merits of the Summary Judgment Order. See Retired Chicago Police, 7 F.3d at 596 (unsuccessful movants for intervention had standing only to appeal the order denying intervention, not an order regarding class certification); City of Chicago, 870 F.2d at 1258 (until putative intervenors become parties "they

cannot appeal from any order in the proceeding other than the denial of that motion"); Hunter, 846 F.2d at 1317 ("one who is denied permission to intervene in an action will not be in a position to take an appeal from the final judgment").

B. Even if Marumoto's Appeal Could Be Construed as an Appeal of the Denial of the Motion to Intervene Based Upon the Merits of that Motion, the Summary Judgment Order's Holding Should be Affirmed Because Marumoto Has No Right to Intervene

Even if Marumoto's Motion to Intervene had been denied on the merits, the denial would have been correct, as: (1) the Motion to Intervene was untimely; and (2) the denial would not have impaired Marumoto's interest in asserting the claims he sought to assert in this action.

In United States v. State of Washington, 86 F.3d 1499, 1503 (9th Cir. 1996), the Ninth Circuit held that a district court must grant a motion to intervene, pursuant to Rule 24(a)(2), "if four criteria are met: timeliness, an interest relating to the subject of the litigation, practical impairment of an interest of the party seeking intervention if intervention is not granted, and inadequate representation by the parties to the action." California Dep't of Toxic Substances, 309 F.3d at 1119. Here, Marumoto cannot satisfy these criteria.

1. Marumoto's Motion to Intervene Was Untimely

This Court has held that three factors should be evaluated to determine whether a motion to intervene is timely: "(1) the stage of the proceeding at which an applicant seeks to intervene; (2) the prejudice to other parties; and (3) the reason

for and length of the delay." California Dep't of Toxic Substances, 309 F.3d at 1119 (citation omitted). "If we find that the motion to intervene was not timely, we need not address any of the remaining elements." Id.

Even if Marumoto could convincingly argue that his interests could be affected by the outcome of this case, he has failed to suggest, much less show, that his Motion to Intervene was timely. This Court has held that "[a] party seeking to intervene must act *as soon as he knows or has reason to know* that his interests might be adversely affected by the outcome of the litigation." California Dep't of Toxic Substances, 309 F.3d at 1119 (citation omitted, emphasis added).

Here, Marumoto's Motion to Intervene was filed at the latest possible stage in the proceeding. The motion came *more than two years and eight months* after plaintiffs initiated the action. Compare ER 12 (Docket) at # 1 and ER 12 at # 147. Indeed, the case had been dismissed, had been to the Ninth Circuit on appeal, and had been on remand to the District Court for more that six months before Marumoto moved to intervene. Marumoto cannot have been unaware of the litigation, as his counsel had moved on behalf of the "Six Non-Natives" to intervene in this very case on November 7, 2007, seven months before Marumoto filed his Motion to Intervene. Moreover, Marumoto waited until after the defendants had filed dispositive motions and only, on the eve of the hearing, moved to intervene. Marumoto offers no colorable reason for the delay, which

appears to be nothing more than an effort to delay a decision with which he might not agree.

Intervention would have caused substantial prejudice, as at the time the Motion to Intervene was held moot, all claims and parties had been disposed of. The parties had thoroughly and repeatedly briefed their arguments, the issues had been appealed, were on remand, and were resolved. An intervention at that point would theoretically have required a resumption and duplication of briefing and needless effort and expense for the parties and the courts. The Motion to Intervene would therefore properly have been denied. Cf. Schonfeld v. City of New York, 14 Fed. Appx. 128, 131 (2d Cir. 2001) (Denial, as untimely, of citizen's motion to intervene as of right in citizen suits challenging city's choice of location for water treatment plant was not an abuse of discretion; citizen moved to intervene in February 2000 in suits that had been removed to federal court in late 1999, citizen had notice of events leading to litigation as early as December 1997, citizen suits had already proceeded to summary judgment stage, and parties would have been prejudiced if further delay occurred.).

Marumoto concedes that he filed his motion only two days before the dispositive motions cut-off in the case, so intervention would have required not only a rescheduling and rebriefing of dispositive motions, but a continuation of the trial date. Indeed, while Marumoto makes a conclusory assertion that a

"postponement" of the litigation to permit his intervention could not have been prejudicial to the defendants, he provides no support whatsoever for this illogical conclusion. Opening Brief at 23.

The length of the delay in seeking intervention here—well over two and a half years—precludes a determination that the Motion to Intervene was "timely," and Marumoto offers absolutely no colorable reason for his delay in bringing the Motion. Because it was untimely, the Court need not address any of the remaining elements. California Dep't of Toxic Substances, 309 F.3d at 1119.

2. Marumoto's Interests Have Not Been and Will Not be Impaired

Even if Marumoto's Motion to Intervene had been denied on the merits, and even if it had not been untimely, a denial still would have been proper, as it would not have impeded Marumoto's interest in asserting the claims he sought to assert in this action. Marumoto explicitly concedes that he sought to intervene in this action "to assert claims for declaratory and injunctive relief similar to the complaint in Kuroiwa v. Lingle, Civil No. CV 08-00153 JMS-KSC." Opening Brief at 1. As Marumoto concedes, the Kuroiwa matter is currently on appeal, and the briefing in that case has not been completed. See Opening Brief at 1 n.1.

Indeed, it is beyond dispute that Marumoto's interests are identical to those of the Kuroiwa plaintiffs. Counsel for Marumoto here is also counsel for the Kuroiwa plaintiffs, who brought their action on behalf of themselves "and others

similarly situated." See Six non-Ethnic Hawaiians' Complaint for Breach of Trust and Deprivation of Civil Rights and to Dismantle Office of Hawaiian Affairs, filed April 3, 2008,[1] at 1. The plaintiffs in Kuroiwa moved to intervene in the instant matter more than a year ago, on November 13, 2007, when it was previously on appeal. See ER 11. Consequently, because Kuroiwa remains pending, Marumoto's interests continue to be pursued by parties with identical interests and by the very same attorney representing him in the instant matter.

C. The Second and Third Issues Presented for Review are Beyond the Scope of this Appeal

The second and third issues Marumoto seeks to have this court address, as summarized at page 2 of the Opening Brief, are well beyond those properly considered on this appeal. First, Marumoto has no standing to appeal the merits of the Summary Judgment Order. See Retired Chicago Police, 7 F.3d at 596; City of Chicago, 870 F.2d at 1258; Hunter, 846 F.2d at 1317. Related arguments therefore should be disregarded. Second, Marumoto's arguments were not before the District court, and are not part of the record, so they cannot properly be considered

[1] Marumoto filed Six Non-Ethnic Hawaiians' Complaint as Supplemental Excerpt of Record "A". Although OHA Defendants have opposed Marumoto's Motion to Supplement Record, filed October 30, 2008, and object to the inclusion of the Six Non-Ethnic Hawaiians' Complaint as part of the record in this case, the Court may take judicial notice of pleadings in related cases pursuant to Federal Rule of Evidence 201. Disabled Rights Action v. Las Vegas Events, 375 F.3d 861, 866 n.1 (9th Cir. 2004).

on appeal. See USA Petroleum, 13 F.3d at 1279 ("Only the record that was before the district court is normally considered, and the summary judgment record cannot be supplemented on appeal.") (citations omitted).

VIII. CONCLUSION

For the foregoing reasons and based on the foregoing authorities, OHA Defendants request that this Honorable Court affirm the District Court's Summary Judgment Order.

DATED: Honolulu, Hawai`i, December 15, 2008.

/s/ Robert G. Klein
ROBERT G. KLEIN
LISA W. CATALDO
LISA MARIE EZRA

Attorneys for Defendants-Appellees Haunani Apoliona, Walter M. Heen, Rowena Akana, Donald B. Cataluna, Robert K. Lindsey, Jr., Colette Y. Machado, Boyd P. Mossman, Oswald Stender and John D. Waihe`e IV in their official capacities as trustees of the Office of Hawaiian Affairs

STATEMENT OF RELATED CASES

OHA Defendants are aware of no related cases other than those listed in the Statement of Related Cases at page 48 of Marumoto's Opening Brief.

DATED: Honolulu, Hawai`i, December 15, 2008.

/s/ Robert G. Klein
ROBERT G. KLEIN
LISA W. CATALDO
LISA MARIE EZRA

Attorneys for Defendants-Appellees
Haunani Apoliona, Walter M. Heen,
Rowena Akana, Donald B. Cataluna,
Robert K. Lindsey, Jr., Colette Y. Machado,
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CERTIFICATE OF SERVICE

I hereby certify that on December 15, 2008, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

The following participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system:

H. WILLIAM BURGESS, ESQ.

WALTER R. SCHOETTLE, ESQ.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed two copies of the foregoing document by First-Class Mail, postage prepaid, for delivery within 3 calendar days, to the following non-CM/ECF participants:

MARK J. BENNETT, ESQ.
Attorney General
WILLIAM J. WYNHOFF, ESQ.
Deputy Attorney General,
State of Hawai`i
Department of the Attorney General
465 South King Street, Suite 300
Honolulu, Hawai`i 96813

Attorneys for Amicus Curiae and Intervenor
Defendant-Appellee State of Hawai`i

MARK J. BENNETT, ESQ.
Attorney General
GIRARD D. LAU, ESQ.
CHARLEEN M. AINA
Deputy Attorneys General
State of Hawai`i
Department of the Attorney General
465 South King Street, Suite 300
Honolulu, Hawai`i 96813

Attorneys for State Defendants-Appellees Former Trustees of the Office of Hawaiian Affairs Clayton Hee and Charles Ota

DATED: Honolulu, Hawai`i, December 15, 2008.

/s/ Robert G. Klein

ROBERT G. KLEIN
LISA W. CATALDO
LISA MARIE EZRA

Attorneys for Defendants-Appellees Haunani Apoliona, Walter M. Heen, Rowena Akana, Donald B. Cataluna, Robert K. Lindsey, Jr., Colette Y. Machado, Boyd P. Mossman, Oswald Stender and John D. Waihe`e IV in their official capacities as trustees of the Office of Hawaiian Affairs