Delong v. Kerai, 7 ROP Intrm. 244 (Tr. Div. 1997)

FLORENCIO DELONG, ET AL.,
Appellants,

v.

UODELCHAD KERAI, ET AL.,
Appellees.

CIVIL ACTION NOS. 195-90, 208-90 & 246-90

Supreme Court, Trial Division
Republic of Palau

Issued: August 19, 1997

BEFORE: LARRY W. MILLER, Associate Justice.

Before the Court is a motion to intervene filed by Vicenta Meriu. Vicenta's motion presents the novel question (at least to this Court) whether a person who did not present a claim before the Land Claims Hearing Office may intervene to present her claim in the Trial Division following the granting of a trial *de novo*. As a matter of first impression, the Court's best guess is that the answer should be "no".

These matters have had a complicated procedural history. They were originally filed as appeals from LCHO determinations issued in April 1990. In February 1991, Justice O'Brien remanded them to the LCHO to retake the testimony of certain witnesses who had not been adequately recorded at the first hearing. The LCHO held a new set of hearings in November 1992 and issued a new (and different) determination in December of that year. When the case returned to this Court, "it was agreed by the parties that the LCHO had overstepped its mandate in issuing its December 1992 determination." Order, April 7, 1993. The Court accordingly vacated that determination and stated, again by agreement ⊥245 of the parties, "that any further adjudication of these disputes . . . should be made on the basis of both the transcript of the initial hearing . . . and the transcript of the hearing held by the LCHO in November 1992." *Id.* Subsequently, however, it was agreed that a trial *de novo* should be held before the Court. *See* Order, June 22, 1993.[1] Because of lengthy, but thus far unsuccessful, attempts at settlement, that trial has not yet been held.

Before addressing the arguments made by Vicenta, one argument she does not make should be mentioned. It is now the law that "a person who collaterally attacks a determination of ownership rendered by . . . the Land Claims Hearing Office on the grounds that statutory or constitutional procedural requirements were not complied with has the burden of proving the non-compliance by clear and convincing evidence." *Ucherremasech v. Wong*, 5 ROP Intrm. 142, 147 (1995). Vicenta has not attempted to meet this burden.

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[1] Although the reasons are not stated in the record, it is the Court's recollection that a new trial was deemed preferable to paying the cost of transcribing the second set of hearings.

Instead, it is her more limited contention that, this Court having determined to hold a new trial with respect to the lands at issue in these matters, [2] there is no bar to her participation in that trial. Vicenta also argues that she should be allowed to participate because the LCHO permitted at least one new party to participate at the second set of hearings that it held.

Vicenta's first argument accurately states the law that, after a new trial has been ordered, a court should treat a motion to intervene as if the original judgment had not been entered. [3] The Court has no quarrel with this proposition and agrees that, in a non-LCHO setting, it would have the discretion to grant -- and would grant -- her motion.

The Court does not believe that it has such discretion in the present circumstances, however. The Court's thinking is this: There is no question that had Vicenta timely filed an appeal from the 1990 determinations issued by the LCHO (or even the 1992 determination), her appeal would have been dismissed on the ground that, having failed to present her claim to the LCHO, she lacked standing to appeal. The same result would have obtained if, rather than filing an appeal, she had moved to intervene at the outset of these matters. Again, the basis for that dismissal would be that -- absent clear and convincing evidence that due notice had not been given -- Vicenta's claim had been extinguished by her failure to present it to the LCHO. Seen in that light, it would be anomalous to hold that Vicenta's claim may <u>now</u> be asserted. Having once been extinguished by her failure to act -- which the Court believes was the intended effect of the LCHO statute -- the Court does not believe that her claim was sprung back to life by the fortuity of this Court having granted a trial *de novo*.[4]

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[2] Because Vicenta focused on the April 7, 1993 Order issued by the Court, there is some debate as to the effect of that Order vis-a-vis the initial determinations issued by the LCHO. In the Court's view, the Order of June 22, 1993 setting a trial date is more pertinent. Although the Court did not formally vacate the initial determinations, the clear import of scheduling a trial *de novo* is that this Court's decision will supersede them.

[3] This is an exception to the general rule disfavoring motions to intervene when they are filed after judgment has been entered.

[4] Consider one more hypothetical: What if Vicenta had appeared before the LCHO but had elected not to file an appeal? Would she be permitted to intervene now? The court thinks not, and again can find no reason that she should be more successful in the present circumstances.

⊥246 Vicenta's second argument, based on the appearance of a new claimant before the LCHO, fares no better. On the analysis just presented, the LCHO should not have permitted new parties to appear even if it had been directed by Judge O'Brien to hold a new, full hearing. It certainly should not have done so where, as here, Judge O'Brien had ordered only that certain testimony be re-taken. Finally, it must be noted that the new party adverted to by Vicenta was not successful before the LCHO and has made no effort to participate further in this Court. Thus, there is no unfairness in excluding Vicenta from participating now.

For all of the reasons set forth above, the motion to intervene is denied.[5]

[5] Counsel for Vicenta had previously informed the Court and opposing counsel that she would be off island during the period when the time to file a notice of appeal would otherwise expire. Pursuant to ROP App. Pro. R 4(b), that time is accordingly extended for a period of 30 days, in other words, to 60 days from the date of this Order.