

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

VIRGIL E. DAY, et al.,)	Civ. No. 05-00649 SOM/BMK
)	
Plaintiffs,)	
)	ORDER GRANTING SECOND MOTION
vs.)	FOR SUMMARY JUDGMENT
)	
HAUNANI APOLIONA,)	
individually and in her)	
official capacity as)	
Chairperson and Trustee of)	
the Office of Hawaiian)	
Affairs, et al.,)	
)	
Defendants,)	
)	
and)	
)	
STATE OF HAWAII,)	
)	
Intervenor-)	
Defendant.)	
)	

ORDER GRANTING SECOND MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION.

Plaintiffs are individuals who describe themselves as having "not less than one-half part" Hawaiian blood. They challenge the manner in which the Office of Hawaiian Affairs ("OHA"), the current trustee of a public land trust created by the act through which Hawaii became a state, P.L. 86-3 (March 18, 1959), reprinted in 73 Stat. 4, 5 ("Admission Act"), has been and is spending certain funds it controls. Plaintiffs argue that OHA is violating federal law by spending the public trust money to better the conditions of all persons having any quantum of Hawaiian blood, instead of restricting such spending to benefit

only people who, like them, have "not less than one-half part" Hawaiian blood.

To the extent Count I of the First Amended Complaint seeks to hold the OHA trustees individually liable for damages under § 1983, the court grants the individual trustees summary judgment, as the trustees are exercising their reasonable fiduciary judgment in determining how to further the purposes of the trust. To the extent Counts I, II, and IV of the First Amended Complaint seek injunctive relief or a declaration that, under the Admission Act, the OHA trustees must use public trust funds only for the betterment of the conditions of people who have "not less than one-half part" Hawaiian blood, the court rules that the Admission Act is not so restrictive. The court need not decide whether state law requires the public trust to be spent in the manner Plaintiffs advocate, as this court has already dismissed all state claims.

II. BACKGROUND.

The facts pertinent to this motion have been set forth in previous decisions. See, e.g., Day v. Apoliona, 496 F.3d 1027 (9th Cir. 2007). In brief, the public trust created by the Admission Act is to be used for one or more of five enumerated purposes:

- [1] for the support of the public schools and other public educational institutions,
- [2] for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian

Homes Commission Act, 1920, as amended, [3] for the development of farm and home ownership on as widespread a basis as possible[,] [4] for the making of public improvements, and [5] for the provision of lands for public use.

P.L. 86-3, § 5(f), 73 Stat. at 6; see also Day, 496 F.3d at 1028; Price v. Akaka, 3 F.3d 1220, 1222 (9th Cir. 1993).

There is no dispute that Hawaii has delegated its public trust duties arising under the Admission Act to OHA or that the restrictions on the uses of the public trust apply to OHA. See Price, 3 F.3d at 1222 (noting that the restrictions in the Admission Act "apply to the use or disposal of the income by OHA"). Under state law, "OHA is funded in part with twenty percent of all income derived from the § 5(f) public trust." Id.; see also Haw. Rev. Stat. § 10-13.5 (1990) ("Twenty per cent of all funds derived from the public land trust . . . shall be expended by [OHA] for the purposes of this chapter."). State law requires OHA to use trust funds "for the betterment of the conditions of native Hawaiians." Haw. Rev. Stat. § 10-3(1) ("A pro rata portion of all funds derived from the public land trust shall be funded in an amount to be determined by the legislature . . . , and shall be held and used solely as a public trust for the betterment of the conditions of native Hawaiians."). OHA also receives other funds that need not be used for any of the purposes enumerated in the Admission Act. See Day, 496 F.3d at 1030.

Plaintiffs Virgil E. Day, Mel Hoomanawanui, Josiah L. Hoohuli, Patrick L. Kahawaiolaa, and Samuel L. Kealoha, Jr., (collectively, "Plaintiffs") claim to be "native Hawaiians," as that term is defined in the Hawaiian Homes Commission Act ("HHCA"), 42 Stat. 108 (1921). First Amended Complaint (March 10, 2006) ¶ 4. The HHCA defines "native Hawaiians" as "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778." 42 Stat. 108; see also Rice v. Cayetano, 528 U.S. 495, 507 (2000) (noting that the HHCA "defined 'native Hawaiians' to include 'any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778'"). In this order, the court uses the term "native Hawaiian" as defined in the HHCA.

As native Hawaiian beneficiaries of the public trust, Plaintiffs claim that the OHA trustees have violated and continue to violate OHA's public trust duties by failing to use trust funds "for the betterment of the conditions of native Hawaiians" only, to the exclusion of other people. Plaintiffs challenge OHA's use of trust funds for the benefit of "Hawaiians" without

regard to blood quantum.¹ See, e.g., First Amended Complaint ¶ 11.

The First Amended Complaint asserts that Defendants:

(1) violated their rights under the Admission Act and the Equal Protection Clause of the Fourteenth Amendment, to the extent those rights are enforceable under 42 U.S.C. § 1983, by expending public trust funds "without regard to the blood quantum contained in the definition of native Hawaiians in HHCA" (Counts I and II); and (2) "breached their duty under the common law of the State of Hawaii and H.R.S. § 10-16(c) of fidelity owed to Plaintiffs as 'native Hawaiian' beneficiaries" (Count III). Although the First Amended Complaint is not entirely clear about the relief it seeks, this court has ruled that, with respect to Counts I through III, Plaintiffs seek damages against the OHA trustees in their individual capacities, and declaratory and injunctive relief against the OHA trustees in their official capacities.

See Order Dismissing Action (Aug. 10, 2006) at 4.

Count IV of the First Amended Complaint also seeks the following declaratory relief:

To the extent that . . . judicial decisions and statutory and constitutional provisions do not clearly establish that all land, income and proceeds therefrom, received by

¹ In this order, the court uses the term "Hawaiian" as defined in Haw. Rev. Stat. § 10-2, which uses "Hawaiian" to mean "any descendent of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778, and which peoples thereafter have continued to reside in Hawaii."

OHA defendants directly or indirectly from the § 5(f) trust must be expended by OHA Defendants for the betterment of the conditions of native Hawaiians, Plaintiffs are entitled to a declaratory judgment holding that all land, income and proceeds received by OHA Defendants directly or indirectly from the § 5(f) trust must be expended by OHA defendants for the betterment of the conditions of native Hawaiians as defined in the [HHCA].

First Amended Complaint ¶ 32.

Plaintiffs identify four specific instances in which they say OHA is using public trust funds for purposes not limited to the betterment of the conditions of native Hawaiians. Plaintiffs say that public trust funds are being used to support (1) proposed federal legislation commonly referred to as the "Akaka Bill," (2) the Native Hawaiian Legal Corporation; (3) the Nā Pua No`eau Education Program; and (4) Alu Like. None of the four matters expressly limits itself to bettering the conditions of only native Hawaiians.

On February 22, 2006, this court granted summary judgment in favor of two former OHA trustees, Clayton Hee and Charles Ota, ruling that the statute of limitations barred Plaintiffs' § 1983 claims against them. On March 10, 2006, Plaintiffs filed a First Amended Complaint, reasserting the same § 1983 claims against Hee and Ota. On June 14, 2006, Hee and Ota filed a second motion for summary judgment based on the statute of limitations. Plaintiffs did not oppose this motion, see

Statement of Non-Opposition to the Second Motion for Summary Judgment of Defendants Hee and Ota (July 21, 2006), and have since abandoned their claims against them. See Memorandum in Opposition to OHA Defendants' Second Motion for Summary Judgment (May 22, 2008) at 2 ("On appeal, Plaintiffs did not appeal this court's dismissal . . . of claims against Defendants HEE and ODA [sic]"). Accordingly, no claims remain against Hee or Ota.

On August 10, 2006, this court dismissed the § 1983 claims asserted in Counts I and II of the First Amended Complaint, ruling that, in light of Gonzaga University v. Doe, 536 U.S. 273 (2002), Plaintiffs may not enforce the Admission Act through § 1983. See Order Dismissing Action (Aug. 10, 2006). The court also dismissed the Equal Protection claims asserted in Counts I and II, ruling that Plaintiffs had not alleged that they had been treated differently than similarly situated people. Id. Finally, the court determined that Counts III and IV of the First Amended Complaint asserted state law claims and declined to exercise supplemental jurisdiction over those claims. Id. To the extent Plaintiffs were attempting to seek declaratory relief under § 1983, the court dismissed the federal claims asserted in Count IV based on Gonzaga. Plaintiffs appealed. See Notice of Appeal (Aug. 16, 2006).

On appeal, Plaintiffs did not challenge this court's dismissal of their Equal Protection claims or their state law

claims. See Memorandum in Opposition to OHA Defendants' Second Motion for Summary Judgment (May 22, 2008) ("On appeal, Plaintiffs did not appeal this court's dismissal of their equal protection claim, of claims against Defendants HEE and ODA [sic] nor state law claims asserted in Count III."). Plaintiffs did challenge this court's dismissal of the § 1983 claims asserted in Counts I and II and contended that Count IV sought a declaration pursuant to § 1983 that the current OHA trustees owe native Hawaiians a duty of loyalty under section 5(f) of the Admission Act. See 2006 W.L. 4109553, Appellants' Opening Brief, No. 06-16625 (Dec. 18, 2006).

On December 19, 2007, the Ninth Circuit reversed this court's determination that Gonzaga foreclosed Plaintiffs' § 1983 claims. The Ninth Circuit held that, as alleged beneficiaries of the public trust, the native Hawaiian Plaintiffs have "an individual right to have the trust terms complied with, and therefore can sue under § 1983 for violation of that right." Day, 496 F.3d at 1039. The Ninth Circuit noted, "Violations of this right may include, at minimum, wrongs of the type of which Day complains: expenditure of funds for purposes not enumerated under § 5(f)." Id. The Ninth Circuit left it to this court "to interpret those § 5(f) purposes to determine in the first instance not only whether Day's allegations are true, but also whether the described expenditures in fact violate § 5(f)." Id.

As Plaintiffs' state law claims had been dismissed and Plaintiffs had not appealed their dismissal, the Ninth Circuit made it clear that this court is to determine only whether OHA is violating federal law. See id. That is, this court must only determine whether OHA's actions comply with any of the five enumerated purposes of the public trust created by section 5(f) of the Admission Act, not whether state law requires OHA to use the public trust solely for the benefit of native Hawaiians.

III. SUMMARY JUDGMENT STANDARD.

Effective December 1, 2007, Rule 56(c) of the Federal Rules of Civil Procedure has been amended. Summary judgment shall be granted when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c) (effective Dec. 1, 2007). "The language of Rule 56 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only." Rule 56 Advisory Committee Notes, 2007 Amendments. Because no substantive change in Rule 56(c) was intended, the court interprets the new rule by applying precedent related to the prior version of Rule 56(c).

One of the principal purposes of summary judgment is to identify and dispose of factually unsupported claims and defenses. Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986). "Only admissible evidence may be considered in deciding a motion for summary judgment." Miller v. Glenn Miller Prods., Inc., 454 F.3d 975, 988 (9th Cir. 2006). Summary judgment must be granted against a party that fails to demonstrate facts to establish what will be an essential element at trial. See Celotex, 477 U.S. at 323. A moving party has both the initial burden of production and the ultimate burden of persuasion on a motion for summary judgment. Nissan Fire & Marine Ins. Co. v. Fritz Cos., 210 F.3d 1099, 1102 (9th Cir. 2000). The burden initially falls on the moving party to identify for the court "those portions of the materials on file that it believes demonstrate the absence of any genuine issue of material fact." T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987) (citing Celotex Corp., 477 U.S. at 323); accord Miller, 454 F.3d at 987. "A fact is material if it could affect the outcome of the suit under the governing substantive law." Miller, 454 F.3d at 987.

On a summary judgment motion, "the nonmoving party's evidence is to be believed, and all justifiable inferences are to be drawn in that party's favor." Miller, 454 F.3d at 988 (quotations and brackets omitted).

IV. ANALYSIS.

A. OHA Trustees Named As Defendants In their Individual Capacities Are Entitled To Summary Judgement on the Merits of the § 1983 Claims Asserted in Count I.

The state law claims having been dismissed, Count I of the First Amended Complaint has been pared down. Still in issue are damage claims brought under 42 U.S.C. § 1983, which provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Plaintiffs claim that the OHA trustees named as Defendants in their individual capacities are individually liable for their alleged misuse of public trust funds. Count I asserts that the OHA trustees violated the provisions of the trust created by the Admission Act when they expended trust funds to (1) support the Native Hawaiian Government Reorganization Act of