

Case
Sanctions

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IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAII

PELE DEFENSE FUND,)	CIVIL NO. 89-089 (Hilo)
	)	(Declaratory Judgment/
Plaintiff,	)	Injunction)
)	
vs.	)	<u>PLAINTIFF PELE DEFENSE FUND'S</u>
	)	<u>MEMORANDUM IN OPPOSITION TO</u>
	)	<u>DEFENDANT TRUE GEOTHERMAL</u>
THE ESTATE OF JAMES CAMPBELL,	)	<u>ENERGY CO., ET ALS.' MOTION</u>
DECEASED; W. H. MCVAY AND	)	<u>FOR RECONSIDERATION OF LETTER</u>
P. R. CASSIDAY, in their	)	<u>RULING DATED MAY 27, 1993 AND</u>
fiduciary capacity as	)	<u>REPLY MEMORANDUM IN SUPPORT OF</u>
Trustees under the Will and	)	<u>PLAINTIFF'S MOTION FOR AN</u>
the Estate of James Campbell;	)	<u>ORDER COMPELLING DISCOVERY AND</u>
TRUE GEOTHERMAL ENERGY CORP.,	)	<u>FOR SANCTIONS; AFFIDAVIT OF</u>
TRUE GEOTHERMAL DRILLING CO.	)	<u>ARNOLD L. LUM;</u>
and MID-PACIFIC GEOTHERMAL,	)	<u>CERTIFICATE OF SERVICE</u>
INC.,)	
	)	Hrg. Date: June 22, 1993
Defendants.	)	Time: 4:00 p.m.
	)	Judge: Honorable Riki May Amano
	)	Trial Date: July 19, 1993

PLAINTIFF PELE DEFENSE FUND'S MEMORANDUM IN OPPOSITION
TO DEFENDANT TRUE GEOTHERMAL ENERGY CO., ET ALS.'
MOTION FOR RECONSIDERATION OF LETTER RULING DATED MAY 27, 1993
AND REPLY MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION
FOR AN ORDER COMPELLING DISCOVERY AND FOR SANCTIONS

I. INTRODUCTION

Plaintiff Pele Defense Fund submits this memorandum in opposition to the motion filed by Defendant True Geothermal Energy Co., et al. (hereinafter "True") seeking reconsideration of the Court's May 27, 1993 ruling requiring True to produce for inspection by Plaintiff, except as deleted by the Court, a copy of the sublease between True and Defendant the Estate of James Campbell. Because the Court has consolidated the hearing on True's motion for reconsideration with Plaintiff's motion for an order compelling discovery and for sanctions, and in the interest of judicial economy, and further because the two motions are interrelated, Plaintiff also presents in this memorandum its reply in support of request for Rule 11 sanctions against True.

II. STANDARD OF REVIEW IN REGARD TO MOTIONS FOR RECONSIDERATION

The Hawaii Rules of Civil Procedure do not expressly authorize motions for reconsideration. See, Anderson v. Oceanic Properties, Inc., 3 Haw. App. 350, 355 (1982) ("the H.R.C.P. do not specifically permit a motion for reconsideration of the Court's decision").¹

It would nonetheless appear that the trial court has the

¹ Cf. Rule 59(b)(1) of the Hawaii Family Court Rules, which expressly authorizes motions for reconsideration of court orders.

discretionary authority to entertain motions for reconsideration, pursuant to the court's general power to hear motions under Rule 7, H.R.C.P., and its inherent power to administer court processes. See, H.R.S. §§ 603-21.9(1) and (6).

The trial court's power to entertain motions for reconsideration is, however, narrowly defined. The established standard of review on a motion for reconsideration before the trial court is whether the motion raises new matters which could not have been presented at the original hearing. K. M. Young & Associates, Inc. v. Cieslik, 4 Haw. App. 657, 666 (1983) (a motion for reconsideration "will not lie to relitigate old matters.") Thus, in the case at bar, the Court's review of True's motion for reconsideration should be confined to the issue of whether True has presented new matters, either factual or legal, that could not have been brought to the Court's attention and the April 16, 1993 hearing on its motion for protective order.

III. ARGUMENT

A. True's Motion For Reconsideration Must Be Denied Because It Introduces No New Matters or Law, and Reconsideration is Neither Necessary to Correct Clear Error Nor to Prevent Manifest Injustice

In addition to the "new matters" test established under the Cieslik case for the review of motions for reconsideration brought in the Hawaii Circuit Courts, it is virtually black letter law that motions for reconsideration brought in the federal courts must advance at least one of three major grounds justifying reconsideration. These are: (1) an intervening change in the controlling law; (2) the availability of new evidence; and (3) the

Bearing in mind that Plaintiff is not privy to the contents of the original 67 reasons advanced by True as to why the sublease should not be produced, it appears, however, that none of the reasons set forth in True's motion for reconsideration would qualify as new matters that either were not brought, or could not have been brought, to the Court's attention in True's May 10, 1993 letter. Certainly, none of the documents referred to by True as "side agreements" postdate True's May 10th letter to the Court, and the grounds advanced by True in support of reconsideration otherwise all cross-reference the original reasons proffered in that letter.

True does not cite any new facts that would warrant reconsideration under the second "major ground" for reconsideration, i.e., the availability of new evidence. All Hawaii Tours, supra, 116 F.R.D. at 649. Accordingly, True's motion for reconsideration fails to meet either the test for reconsideration established by the Hawaii Intermediate Court of Appeals in Cieslik, or the weight of authority under federal decisional law, that motions for reconsideration are meritless unless they raise new matters of a strongly convincing nature. NRDC v. EPA, supra, 705 F.Supp. at 700; Painting Ind. of Hawaii, supra, 756 F.Supp. at 453.

In addition, True's motion is also without merit because it fails to cite any intervening change in the controlling law, the first "major ground" for reconsideration. All Hawaii Tours, supra, 116 F.R.D. at 648. Even assuming, arguendo, that True's motion for

need to correct clear error or prevent manifest injustice. All Hawaii Tours, Corp. v. Polynesian Cultural Center, 116 F.R.D. 645, 648-49 (D.Haw. 1987), partially rev'd. on other grnds., 855 F.2d 860 (9th Cir. 1988). In arriving at its determination as to whether any of the required "major grounds" for reconsideration are present, the trial court may review the motion to determine whether it sets forth either facts or law of a "strongly convincing" nature that would induce the court to reverse its prior decision. Painting Ind. of Hawaii v. U.S. Department of Air Force, 756 F.Supp. 452, 453 (D.Haw. 1990). This is because the weight of authority supports the view that motions for reconsideration which seek simply to relitigate old issues heard at the underlying trial or motion are without merit. Natural Resources Defense Council v. U.S. E.P.A., 705 F.Supp. 698, 700-701 (D. D.C. 1989).

Turning to the merits of the instant motion for reconsideration, True advances 12 enumerated "reasons" as to why the Court should reconsider its ruling of May 27, 1993. Unfortunately, Plaintiff was not provided with a copy of True's original reasons, submitted to the Court on May 10, 1993, in support of its motion for protective order. True, in its memorandum in support of motion for reconsideration, does indicate that it submitted 67 separately numbered reasons in support of why the sublease should not be produced to the Court and cites, by numerical reference, 11 of the original reasons, and four separate "side agreements" that are (apparently) either attached to or referenced in the body of the sublease.

reconsideration advances new legal grounds that were not previously brought to the Court's attention, either in True's motion for protective order or in its letter submitted to the Court on May 10, 1993, motions for reconsideration are not to be regarded as vehicles to bring before the court theories or arguments that were not advanced earlier. NRDC v. EPA, supra, 705 F.Supp. at 701. The holding of the court in the NRDC case also forecloses True's claim that it has raised a new matter by reformulating the prayer for relief in its memorandum in support of motion for reconsideration. See, Defendants True Geothermal Energy Corp, et als.' Memorandum in Opposition, etc., at p. 6 (hereinafter "True's Memorandum").

Finally, reconsideration of the Court's May 27, 1993 ruling would not serve either to correct clear error or prevent manifest injustice, the third "major ground" upon which motions for reconsideration may be entertained. All Hawaii Tours, supra, 116 F.R.D. at 649. In its memorandum in opposition to Plaintiff's motion to compel and for sanctions, True advances the following argument, couched in support of its claim that, for the purpose of reconsideration, a new matter has indeed been raised: because Plaintiff on May 11, 1993, filed a motion for leave to amend the complaint in this case to add alternative claims for relief, this raises new issues, which therefore warrants True's motion for reconsideration. See, True's Memorandum, at pp. 5 and 6.

However, because the Court on May 19, 1993, denied Plaintiff's motion for leave to amend, except in regard to Plaintiff's request to delete from the caption the names of the State Defendants (who

were previously dismissed from the action), True's argument is not only difficult to comprehend and appears to be disingenuous,² but is also completely without merit. The Court's ruling denying Plaintiff's motion to amend was issued nine days before True first indicated by letter to the parties and the Court on May 28, 1993, that it would file a motion for reconsideration. The Court's Order of May 19th obviously rendered moot any possible claim by True that new matters were now at play in this case.

Plaintiff disputes True's "new matter" claim, not only because it lacks merit, but to point out to the Court that such a claim would not form grounds for reconsideration under the third "major ground", i.e., to prevent manifest injustice. Obviously, since the Court denied Plaintiff's motion to amend its complaint, manifest injustice would not result if True's motion for reconsideration were denied on the grounds advanced by True.

B. The Weight of Judicial Precedence Supports The Imposition of Rule 11 Sanctions Against True

As True correctly observes, H.R.C.P. Rule 11 is virtually identical with Rule 11 of the Federal Rules of Civil Procedure. De Silva v. Burton, 9 Haw. App. 222, 226 (1992). Plaintiffs and True also agree that the Court may sanction True under Rule 11, if its pleading is determined to be either: (1) factually or legally frivolous; or (2) interposed for an improper purpose. See, True's Memorandum, at p. 4; see, also, Zaldivar v. City of Los Angeles,

² True's argument is also illogical -- relevance is not an issue that relates to new evidence. Moreover, if the scope of the relevant issues has expanded, then the sublease should be even less protected from disclosure.

780 F.2d 823, 831 (9th Cir. 1986); All Hawaii Tours, supra, 116 F.R.D. at 650. Both criteria are to be tested by an objective "reasonableness" standard; subjective bad faith is not required. Zaldivar, id. at 829 and 831; All Hawaii Tours, ibid.

In order to determine whether True's motion for reconsideration is factually or legally frivolous, the relevant inquiry is whether the pleading contains new evidence or advances new arguments of law that explain why the court should change an original order that was proper when made. Magnus Elec., Inc. v. Masco Corp. of Indiana, 871 F.2d 626, 630 (7th Cir. 1989). If the motion for reconsideration introduces nothing new, the court may appropriately impose sanctions under Rule 11 on the theory that the pleading does nothing more than "waste[] the time of court and counsel." MGIC Indemnity Corp. v. Weisman, 803 F.2d 500, 505 (9th Cir. 1985) (affirming Judge Pence's imposition of sanctions in the amount of \$4,554.00 in attorney fees against movant's counsel).

As discussed in the previous subsection of this memorandum, True's motion for reconsideration contains no new evidence, and cites no new cases or laws that have arisen between the date True filed its motion for protective order and the Court's ruling on May 27, 1993. True has simply recast the arguments previously made by it to the Court in its letter of May 10, 1993, proffering numerous reasons why the sublease should be withheld from discovery. Viewed objectively under the applicable "reasonableness" standard, it is abundantly clear that True's motion for reconsideration contributes absolutely nothing to this case, either in terms of the facts or

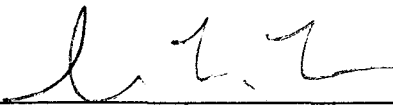
the law.

Moreover, this case is now beyond the June 19, 1993 discovery cut off date, and True has still not produced the sublease as ordered by the Court. True's behavior thus raises the issue of whether its motion for reconsideration was indeed interposed for an improper purpose, to wit, to delay discovery beyond the cut off date. True could have, after service on June 9, 1993, of Plaintiff's motion to compel and for sanctions, simply complied with the Court's May 27th ruling, which would have provided some indication that its motion for reconsideration was not interposed for an improper purpose. However, True's steadfast refusal to produce the requested sublease, even in the face of the impending discovery cut off date, clearly supports an inference of improper purpose.

IV. CONCLUSION

For the foregoing reasons, Plaintiff Pele Defense Fund respectfully requests that the Court deny True's motion for reconsideration and grant Plaintiff the relief requested in its Motion For an Order Compelling Discovery and For Sanctions.

DATED: Honolulu, Hawaii, June 21, 1993



PAUL F. N. LUCAS
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vs.)	AFFIDAVIT OF ARNOLD L. LUM
)	
THE ESTATE OF JAMES CAMPBELL,)	
DECEASED; et al.,)	
Defendants.)	
)	

AFFIDAVIT OF ARNOLD L. LUM

STATE OF HAWAII)	
	)	SS:
CITY AND COUNTY OF HONOLULU)	

ARNOLD L. LUM, being first duly sworn upon oath, hereby deposes and says:

1. I make this affidavit in support of Plaintiff's request for Rule 11 sanctions against Defendants True Geothermal Energy Co., et al.;

2. I have performed the following tasks in regard to Defendants True Geothermal Energy Co., et als.' motion for reconsideration, with the time spent indicated below:

Date	Task	Time
June 18, 1993	legal research re and preparations of memorandum in opposition to True's motion for reconsideration	2.5 hours
June 21, 1993	revise memorandum in opposition	1.5 hours

3. I request that Defendants True Geothermal Energy Co., et al. be ordered to pay the Native Hawaiian Legal Corporation an additional \$500.00 in attorney fees for the time incurred in responding to True's motion for reconsideration.

FURTHER AFFIANT SAYETH NAUGHT.

CLZ
ARNOLD L. LUM

Subscribed and sworn to before me
this 21st day of June, 1993.

Carleen H. Onellas
Notary Public, State of Hawaii

My Commission Expires: 9/12/93

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)	CERTIFICATE OF SERVICE
THE ESTATE OF JAMES CAMPBELL)	
DECEASED, et al.,)	
)	
Defendants.)	
_____)	

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was duly served upon the following parties, by U.S. Mail, postage prepaid, to their last known address.


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DATED: Honolulu, Hawai'i, June 21, 1993.



ARNOLD L. LUM
Attorney for Plaintiff