NO. 23379

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

JON VON KESSEL, Plaintiff-Appellant, v.
HILTON H. UNEMORI, Defendant-Appellee
and
ECM, INC., a Hawaii Corporation; DAVID R. TACHENY;
and DOE DEFENDANTS, 1-10, Defendants.

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CIVIL NO. 96-0592)

SUMMARY DISPOSITION ORDER
(By: Burns, C.J., Lim and Foley, JJ.)

Plaintiff-Appellant Jon von Kessel (von Kessel) appeals (1) the March 22, 2000 final judgment of the circuit court of the first circuit, entered upon a bench trial, the Honorable Gary W.B. Chang, judge presiding, in favor of Defendant-Appellee Hilton H. Unemori (Unemori); and (2) the underlying findings of fact and conclusions of law and order of the court filed March 8, 2000.

This case involves a contract in which Unemori agreed to purchase a parcel of undeveloped Oregon land from von Kessel, a contract which Unemori breached. Essentially, von Kessel's general argument on appeal is (1) that the court erred in finding that the purchase and sale agreement provided for liquidated damages in the amount of $22,500.00, rather than the $175,000.00 amount that von Kessel contends the purchase and sale agreement

specified and the parties intended; and (2) that the court erred in enforcing the $22,500.00 liquidated damages provision it found because, at the time of contracting, that amount was not a reasonable estimate of the damages Unemori's breach would entail.

Upon an exacting review of the record and the briefs submitted by the parties, and having given due consideration to the arguments advanced and the issues raised by the parties, we resolve the questions presented on appeal as follows:

1.

> Whether the [court] erred when it found and concluded that [von Kessel] did not complete his preliminary planning?

This finding of fact by the court is not clearly erroneous because there was substantial evidence in the record to support it. State v. Okumura, 78 Hawai'i 383, 392, 894 P.2d 80, 89 (1995). The court heard testimony from several different witnesses on this point, including von Kessel, who averred that the subject real property was "permit-ready[,]" but admitted that he had not obtained a permit to start construction. In addition, Unemori's agent, David R. Tacheny (Tacheny), testified that the project had not yet complied with Americans with Disabilities Act rules and had not resolved a wetlands issue, among the many approvals needed before construction could commence. Tacheny also noted that many of the consultants involved in the preliminary planning remained unpaid.

2.

> Whether the [court] erred when it found and concluded that Exhibit 12 was the Agreement executed on November 5, 1993, as opposed to Exhibit 24?

(Underlining in the original.)

Although the court apparently confused the date Exhibit 24 was signed (November 5, 1993) with the date Exhibit 12 was signed (on or about January 6, 1994), this variance is immaterial. Von Kessel himself testified that Exhibit 12 was merely a cleaned-up version of Exhibit 24 that incorporated the handwritten modifications he had made to Exhibit 24 before it was signed, and that Exhibit 12 was "the most recent and amended version of the original contract[,]" the version he had attached to his complaint and was seeking to enforce. The court's error was therefore harmless.

3.

> Whether the [court] erred when it found and concluded that the sum of $22,500.00 was a reasonable preestimate of harm that [von Kessel] might suffer in the event of a breach of the Agreement by [Unemori].

This finding of fact by the court is not clearly erroneous because there was substantial evidence in the record to support it. Okumura, 78 Hawai‘i at 392, 894 P.2d at 89. Although Exhibit 12, paragraph 3, refers to "the amount of $175,000 payable to Seller in cash" as "a forfeitable earnest money deposit in accordance with the terms of this Agreement[,]" Exhibit 12, paragraph 7.4, provides that, "Purchaser will pay $175,000.00 in cash at closing, less a credit of $25,000.00 for

the earnest money deposit previously paid" (underlining in the original), and Exhibit 12, paragraph 7.5(b), provides that, "Purchaser shall pay the $175,000.00 of the Purchase Price to Seller in cash, adjusted for the charges and credits set forth in this section, less a credit for the earnest money deposit of $25,000.00[.]" Moreover, Exhibit 24, upon which von Kessel relies, contains identical provisions, except for paragraph 7.5(b), in which there is a blank in place of "25,000.00[.]"

This ambiguity on the face of the contract necessitated and enabled resort by the court to parol evidence concerning the parties' intentions in contracting. McGary v. Westlake Investors, 661 P.2d 971, 974 (Wash. 1983). At trial, the court heard testimony from Unemori and Tacheny that the parties intended the $22,500.00 amount to be the forfeitable earnest money deposit. It was the court's sole and exclusive prerogative to believe their testimonies over the contrary testimony of von Kessel. State v. Eastman, 81 Hawai'i 131, 139, 913 P.2d 57, 65 (1996).

Finally, von Kessel hand-wrote the $25,000.00 figure into the blank provided in paragraph 7.4 of Exhibit 24 for "the earnest money deposit previously paid." Having thus introduced the ambiguity into the agreement, von Kessel will have the ambiguity construed against him. McGary, 661 P.2d at 975.

4., 5. & 6.

> Whether the [court] erred when it found and concluded that the parties agreed that [Unemori] would actually deposit or pay into escrow as earnest money the specific sum of $22,500.00, rather than $175,000.00?
>
> Whether the [court] erred when it found and concluded that, at the time of the execution of the Agreement, it was not reasonable to foresee that [von Kessel] would lose ownership and beneficial interest in the [subject real property] if the subject sale did not close?
>
> Whether the [court] erred when it found and concluded that [von Kessel] is not entitled to any further recovery, amounts, or damages for [Unemori's] breach of the Agreement?

The first and second questions refer to findings of fact of the court. The third question refers to a conclusion of law of the court. The challenged findings of fact of the court are not clearly erroneous because there was substantial evidence in the record to support them. Okumura, 78 Hawai'i at 392, 894 P.2d at 89. The challenged conclusion of law of the court is correct because it was supported by the court's findings of fact and reflects an application of the correct rule of law. Dan v. State, 76 Hawai'i 423, 428, 879 P.2d 528, 533 (1994).

Von Kessel himself testified several times, quite adamantly, that he had numerous options other than the Unemori purchase for the sale or joint venturing of the subject real property. He even mentioned one prospect by name, who von Kessel insisted was "still available" on February 11, 1994, the projected date of recording of the deed in lieu of foreclosure. Therefore, it was reasonable, at the time of contracting, for the parties to believe that von Kessel would not lose the subject

real property or its beneficial interest if the Unemori purchase did not close. By the same token, it was reasonable, at the time of contracting, for the parties to estimate that von Kessel would be damaged, in the event of Unemori's breach, only in his time and in the amount he paid his note holder to stave off foreclosure on the subject real property pending the Unemori purchase. See Wallace Real Estate Investment, Inc. v. Groves, 881 P.2d 1010, 1015-18 (Wash. 1994).

Von Kessel's failure to check Unemori's financial status and capability, his failure to monitor deposit of the full $175,000.00 he asserts was the up-front earnest money deposit, and his failure to arrange a backup offer or alternative financing in the event the Unemori deal fell through, all of which created the precipitous situation that prevailed when Unemori could not come up with the money, should not alter our conclusions with respect to the expectations of the parties at the time of contracting.

Finally, von Kessel and Unemori were both avowedly sophisticated businessmen, a factor which "may point to the increased enforceability of liquidated damages provisions in commercial agreements." Id. at 1018. In this respect, it would seem reasonable that a sophisticated businessman, under the duress of imminent foreclosure on his development project, would agree to a lower liquidated damages amount in order to convince a perceived "white knight" purchaser to buy, and it would seem

unreasonable that the purchaser, also a sophisticated businessman, but dependent upon financing contingencies, would agree to a liquidated damages amount fully half that of the purchase price. "[P]arty sophistication will often be relevant in determining the fairness of a stipulated damages provision." Id. (citation omitted).

In general, "It is not the role of the court to enforce contracts so as to produce the most equitable result. The parties themselves know best what motivations and considerations influenced their bargaining, and, while, the bargain may be an unfortunate one for the delinquent party, it is not the duty of courts of common law to relieve parties from the consequences of their own improvidence." Watson v. Ingram, 881 P.2d 247, 250 (Wash. 1994) (brackets, ellipses, citation and internal quotation marks omitted).

The challenged findings of fact by the court support its conclusion of law that von Kessel was not entitled to further recovery, and that conclusion of law reflects an application of the correct rule of law. See Wallace Real Estate, 881 P.2d at 1015-18; Watson, 881 P.2d at 250.

Therefore,

IT IS HEREBY ORDERED that the March 22, 2000 final judgment of the court, and the court's March 8, 2000 findings of fact, conclusions of law and order, are affirmed.

DATED: Honolulu, Hawai'i, November 21, 2002.

On the briefs:

Gregory T. Grab, for plaintiff-appellant.

Chief Judge

Robert T. Kawamura, for defendant-appellee.

Associate Judge

Associate Judge