NOT FOR PUBLICATION

NOS. 24428, 24739

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

NO. 24428

LORENE A. CHANG, Plaintiff-Appellant, v. HELEN KUN HO, Individually, and as Trustee under the unregistered Trust Agreement dated April 2, 1984; WILMA JUNE HO EZZELL, and BRENDA KIN LAN HO, Individually, and as Successor Co-Trustees under the unregistered Trust Agreement dated April 2, 1984; HARRIET HO; OI WUN YOUNG; JOSEPH LAU; Defendants-Appellees, and ISLAND HOMES, INC., a Hawai'i corporation; et al., Defendants.

(CIV. NO. 00-1-3790)

AND

NO. 24739

LORENE A. CHANG, Plaintiff-Appellant, v. HELEN KUN HO, Individually, and as Trustee under the unregistered Trust Agreement dated April 2, 1984; WILMA JUNE HO EZZELL, and BRENDA KIN LAN HO, Individually, and as Successor Co-Trustees under the unregistered Trust Agreement dated April 2, 1984; HARRIET HO; OI WUN YOUNG; JOSEPH LAU; Defendants-Appellees, and ISLAND HOMES, INC., a Hawai'i corporation; et al., Defendants.

(CIV. NO. 01-1-2437)

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT

MEMORANDUM OPINION

(By: Watanabe, Acting C.J., Lim and Foley JJ.)

Two appeals (Nos. 24428 (Civil No. 00-01-3790) & 24739 (Civil No. 01-1-2437)) are presented involving much the same parties and similar legal issues. We granted Plaintiff-Appellant

Lorene A. Chang's (Chang) motion to consolidate on July 31, 2002. Hawai'i Rules of Appellate Procedure (HRAP) Rule 3(b) (West 2002).

In No. 24428, Chang appeals (1) the June 27, 2001 order of the circuit court of the first circuit[1] that granted the May 15, 2001 motion for summary judgment filed by Defendants-Appellees Helen Kun Ho, Brenda Kim Lan Ho, Wilma June Ho Ezzell and Harriet Ho (collectively, the Hos), Defendants-Appellees Oi Wun Young and Joseph Lau joining in the motion; (2) the July 25, 2001 order that denied Chang's June 4, 2001 motion to file first amended complaint; (3) the August 23, 2001 order granting the Hos' July 23, 2001 motion for award of attorneys' fees and costs; and (4) the August 23, 2001 judgment entered in favor of all Defendants, dismissing Chang's December 13, 2000 complaint with prejudice and awarding the Hos $26,504.45 in attorneys' fees and costs.

In No. 24739, Chang appeals (1) the court's November 7, 2001 order that granted the September 27, 2001 motion for summary judgment filed by the Hos, Oi Wun Young joining in the motion;[2] and (2) the December 18, 2001 order that granted the Hos' November 13, 2001 motion for award of attorneys' fees and costs,

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[1] The Honorable Dan T. Kochi presided over all aspects of both cases.

[2] Joseph Lau, Defendant-Appellee in No. 24428 (Civil No. 00-01-3790, was not sued in Civil No. 01-1-2437 (No. 24739).

in the amounts of $11,042.26 in fees and $117.87 in costs.

In both appeals, we affirm.

I. No. 24428.

A. The Motion for Summary Judgment.

Chang contends first on appeal that the court erred in granting the May 15, 2001 motion for summary judgment filed by the Hos.[3] The allegedly fraudulent sale of the apartment building closed in 1989. Blair v. Ing, 95 Hawai'i 247, 264, 21 P.3d 452, 469 (2001) (under "the traditional 'occurrence rule,' . . . the accrual of the statute of limitations begins when the negligent act occurs or the contract is breached"). Hence, the last to run of the applicable statutes of limitations ran six years after the sale, in 1995. Hawaii Revised Statutes (HRS) § 657-1(4) (1993); Au v. Au, 63 Haw. 210, 217, 626 P.2d 173, 179 (1981) ("the relevant [six-year] limitations period for fraudulent representation is governed by HRS § 657-1(4)"); HRS §

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[3] We review *de novo* a circuit court's grant or denial of a motion for summary judgment. Hawaii Community Fed. Credit Union v. Keka, 94 Hawai'i 213, 221, 11 P.3d 1, 9 (2000). Accordingly,

> [o]n appeal, an order of summary judgment is reviewed under the same standard applied by the circuit courts. Summary judgment is proper where the moving party demonstrates that there are no genuine issues of material fact and it is entitled to a judgment as a matter of law. In other words, summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law.

Pancakes of Hawaii, Inc. v. Pomare Properties Corp., 85 Hawai'i 286, 291, 944 P.2d 83, 88 (App. 1997) (citation and internal block quote format omitted). See also Hawai'i Rules of Civil Procedure (HRCP) Rule 56(c) (West 2002).

657-1(1) (1993); Au, 63 Haw. at 219, 626 P.2d at 180 ("breach of contract warranty" claims are governed by the six-year limitations period of HRS § 657-1(1); HRS § 480-24(a) (1993) ("action to enforce a cause of action arising under this chapter shall be barred unless commenced within four years after the cause of action accrues"). Because Chang filed her complaint on December 13, 2000, all of her claims were time-barred.

Citing Basque v. Yuk Lin Liau, 50 Haw. 397, 399, 441 P.2d 636, 637-38 (1968) (statute of limitations begins to run "when the plaintiff knew or in the exercise of reasonable care should have discovered that an actionable wrong has been committed against his property"), Chang argues that the "discovery rule" applies in this case, such that her causes of action accrued and the applicable statutes of limitation began to run in 1998, when the City and County of Honolulu Building Department cited the apartment building for the nonconformity that is the basis of her claims. Even assuming, *arguendo*, that the discovery rule applies in this case, this argument cannot be sustained, for Chang admitted below and acknowledges on appeal that she was informed in writing, before the closing of the sale, that the apartment building was

> non-conforming and was originally constructed as twenty(20) - 2 bedroom, 2 bath units which were partitioned into thirty-eight(38) - 1 bedroom, 1 bath units with one(1)- 2 bedroom, 2 bath unit.

Hence, by her own authority, Chang's causes of action accrued and the applicable statutes of limitations began to run in 1989,

because she then "knew or in the exercise of reasonable care should have discovered that an actionable wrong ha[d] been committed[.]" Id. Chang nonetheless reasons that there was no actionable wrong reasonably apparent until the citation formally deemed the nonconformity "illegal." This reasoning is unreasonably ingenuous, and posits a distinction without a whit of difference in law under the circumstances of this case.

Chang also alleged that some of the Defendants affirmatively assured her, at various times, that a building permit had been obtained for the conversion of the apartment building, and/or that the nonconformity was "legal." Such allegations notwithstanding, Chang, an attorney and a licensed realtor represented by another licensed realtor in the transaction, "knew or in the exercise of reasonable care should have discovered that an actionable wrong ha[d] been committed[,]" id., when she was provided with the written disclosure of nonconformity.

Upon the same allegations of affirmative misrepresentation, Chang also argues that, under HRS § 657-20 (1993),[4] her causes of action accrued and the applicable

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[4] Hawaii Revised Statutes (HRS) § 657-20 (1993) provides:

> If any person who is liable to any of the actions mentioned in this part or section 663-3, fraudulently conceals the existence of the cause of action or the identity of any person who is liable for the claim from the knowledge of the person entitled to bring the action, the action may be commenced at any time within six years after the person who is entitled to bring the same discovers or should have discovered, the existence of the cause of action or the identity of the person who

statutes of limitation began to run with the Building Department's citation in 1998. We disagree. HRS § 657-20 "involves the actions taken by a liable party to conceal a known cause of action." Au, 63 Haw. at 215, 626 P.2d at 178. Here, the allegedly actionable nonconformity was disclosed in writing before the sale of the apartment building was closed. "If there is a known [(to the plaintiff)] cause of action there can be no fraudulent concealment[.]" Id. at 216, 626 P.2d at 178 (citation, internal block quote format and original emphasis omitted). By the same token, Chang's fleeting and conclusory references on appeal to the doctrines of equitable tolling[5] and equitable estoppel[6] are unavailing.

We conclude the court did not err in granting the May 15, 2001 motion for summary judgment.

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is liable for the claim, although the action would otherwise be barred by the period of limitations.

[5] Plaintiff-Appellant Lorene A. Chang (Chang) does not support her definition or use of the doctrine of equitable tolling with "citations to the authorities, statutes and parts of the record relied on[,]" as required, Hawai'i Rules of Appellate Procedure Rule 28(b)(7) (West 2002), so we are otherwise at a loss to review her argument in this respect.

[6] In addition, there is nothing in the record to indicate both that Chang "detrimentally relied on the representation of the party sought to be [equitably] estopped and that the reliance was reasonable." Federal Home Loan Mortgage Corp. v. Transamerica Ins. Co., 89 Hawai'i 157, 166, 969 P.2d 1275, 1284 (1998) (citing State Farm Mut. Auto. Ins. Co. v. GTE Hawaiian Tel. Co., 81 Hawai'i 235, 244, 915 P.2d 1336, 1345 (1996)). Furthermore, because there is nothing in the record to show that the Defendants made representations that "would tend to lull" Chang into inaction based on her belief that they would not assert the statute of limitations as a defense, Mauian Hotel, Inc. v. Maui Pineapple Co., Ltd., 52 Haw. 563, 571, 481 P.2d 310, 315 (1971) (citation and internal quotation marks and block quote format omitted), the Defendants were not equitably estopped from asserting the defense.

B. The Motion to File First Amended Complaint.

Chang next argues that the court abused its discretion in denying her motion to file first amended complaint.[7] In her motion, Chang alleged that

> [i]n December 2000, architect Andrew Yanoviak was retained by [Chang] to physically inspect the apartment building located at 3004 Ala Napuaa Place, Honolulu, Hawaii. Mr. Yanoviak noticed that the material on the ceiling of the apartment appeared to be asbestos and recommended that [Chang] have the material tested by an environmental laboratory. On May 23, 2001, Inalab Laboratory formally reported that the material on the ceiling of the units in the apartment building was asbestos and ceiling samples tested the percentage of asbestos to be 7% to 10%.

Thus, by her own admission, Chang knew of her potential asbestos claim during the same time period she filed her complaint -- December 2000. Instead of including the asbestos claim in her complaint, or amending the complaint shortly thereafter, Chang waited until after the summary judgment proceedings had begun to file her motion to amend. In fact, Inalab Laboratory did not receive the asbestos samples for testing until May 22, 2001, seven days after the Hos had filed their May 15, 2001 motion for summary judgment. Chang filed her motion to amend on June 4, 2001, a mere ten days before the hearing on the motion for summary judgment. Clearly, Chang's motion was "a vehicle to circumvent summary judgment[,]" something we do not condone. Federal Home Loan Mortgage Corp. v. Tranamerica Ins. Co., 89 Hawai'i 157, 162, 969 P.2d 1275, 1280 (1998) (citations and

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[7] Federal Home Loan Mortgage Corp., 89 Hawai'i at 162, 969 P.2d at 1280 ("We have said that the grant or denial of leave to amend under [HRCP] . . . Rule 15(a) (1996) is within the discretion of the trial court." (Brackets, citation and internal quotation marks omitted.)).

internal quotation marks omitted). At the very least, the circumstances surrounding the filing of Chang's motion to amend indicate "undue delay, bad faith or dilatory motive on the part of the movant," one of the generally recognized grounds for denying such a motion. Id. (citations and internal block quote format omitted).

We conclude the court's denial of the June 4, 2001 motion to file first amended complaint was not an abuse of discretion.

C. The Motion for Award of Attorneys' Fees and Costs.

Chang argues that the court erred in granting attorneys' fees to the Hos for both assumpsit and non-assumpsit claims, because HRS § 607-14 (Supp. 2002)[8] allows attorneys' fees only in "actions in the nature of assumpsit." We disagree. The court did not abuse its discretion[9] in awarding the Hos all of

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[8] HRS § 607-14 (Supp. 2002) provides, in pertinent part:

> In all the courts, in all actions in the nature of assumpsit and in all actions on a promissory note or other contract in writing that provides for an attorney's fee, there shall be taxed as attorneys' fees, to be paid by the losing party and to be included in the sum for which execution may issue, a fee that the court determines to be reasonable; provided that the attorney representing the prevailing party shall submit to the court an affidavit stating the amount of time the attorney spent on the action and the amount of time the attorney is likely to spend to obtain a final written judgment, or, if the fee is not based on an hourly rate, the amount of the agreed upon fee. The court shall then tax attorneys' fees, which the court determines to be reasonable, to be paid by the losing party; provided that this amount shall not exceed twenty-five per cent of the judgment.

[9] This court reviews the circuit court's denial and granting of attorney's fees under the abuse of discretion standard. The trial court abuses its discretion if it bases its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence. Stated differently, an abuse of discretion occurs

their reasonable attorneys' fees[10] under HRS § 607-14, because all of Chang's claims sounded in assumpsit.

Claims in assumpsit seek "monetary damages based upon the non-performance of a contractual or quasi-contractual obligation (*i.e.*, breach of contract)." TSA Int'l Ltd. v. Shimizu Corp., 92 Hawai'i 243, 264, 990 P.2d 713, 734 (1999). See also Schulz v. Honsador, 67 Haw. 433, 435, 690 P.2d 279, 281 (1984). Here, Chang sought

> special, general, and punitive damages, and treble damages under [HRS] Chapter 480, and restitution of all monies received by Defendants, and costs and attorney's fees, and such other damages as the Court may determine.

This prayer was predicated, in essence, upon Chang's claim that she was denied the purported benefit of her bargain -- in her terminology, ownership of a "legal" building. Thus Chang sought, in all the causes of action of her complaint no matter how denominated, "monetary damages based upon the non-performance of a contractual or quasi-contractual obligation (*i.e.*, breach of contract)." TSA Int'l Ltd., 92 Hawai'i at 264, 990 P.2d at 734.

> where the trial court has clearly exceeded the bounds of reason or disregarded rules or principles of law or practice to the substantial detriment of a party litigant.

TSA Int'l Ltd. v. Shimizu Corp., 92 Hawai'i 243, 253, 990 P.2d 713, 723 (1999) (brackets, citations and internal quotation marks and block quote format omitted).

[10] The court did not grant all of the attorneys' fees the Hos requested for preparation of their motion for award of attorneys' fees and costs: "it seems like the $7,600 is a bit much; and therefore, the Court will reduce that to $2,500."

This is not a case like TSA Int'l Ltd., which Chang cited in opposition below, in which the supreme court held that "[t]he mere fact that TSA's claims relate to a contract between the parties does not render a dispute between the parties an assumpsit action. Instead, TSA's claims for fraud and breach of fiduciary duty sound in tort." Id. Although TSA Int'l Ltd. involved similar allegations of fraudulent inducement, breach of fiduciary duty via non-disclosure, and various statutory violations including an HRS Chapter 480 claim, the primary relief sought upon those allegations was "reformation and rescission" of the agreement *sub judice*, id. at 249, 990 P.2d at 719, and not monetary damages for breach of that agreement. In promulgating its holding, the TSA Int'l Ltd. court cited for support our opinion in Romero v. Hariri, 80 Hawai'i 450, 911 P.2d 85 (App. 1996), which Chang also relied on below, in which the plaintiff alleged, "*inter alia*, fraud, breach of fiduciary duty, unfair or deceptive practices, and intentional or negligent infliction of emotional distress[,]" but prayed for a declaration that the subject agreements were void. Id. at 453, 911 P.2d at 88. It was the latter circumstance that informed our holding that the plaintiff's claims fell outside the terms of a contractual fee provision providing for an award of attorneys' fees "arising out of or relating to this Agreement or the breach thereof[.]" Id. at 459, 911 P.2d at 94 (internal quotation marks omitted). We

held:

> Clearly, Romero's claim falls outside the terms of the fee provisions contained in the Options. Romero's claim does not involve a dispute "arising out of or relating to [the Options] or the breach thereof." Instead, she challenges the validity of the Options based on fraud and sought to prevent their enforcement. Consequently, we hold that the trial court did not err in denying Romero's motion for attorneys' fees on the basis that the claim is one in tort because her claim falls outside the terms of the agreement authorizing an award of attorneys' fees.

Id. (Brackets in the original). In our case, Chang did not seek rescission or invalidation of the sales agreement.

We conclude the court did not abuse its discretion in granting the July 23, 2001 motion for award of attorneys' fees and costs.

II. No. 24739.

A. The Motion for Summary Judgment.

In this appeal, Chang contends the court erred in granting the September 27, 2001 motion for summary judgment filed by the Hos. Chang first argues that the court misapplied the doctrine of *res judicata*, because this lawsuit, Civil No. 01-1-2437 (second action), did not present issues identical to those presented in the prior lawsuit, Civil No. 00-01-3790 (No. 24428) (first action).

It is a well-pedigreed principle that *res judicata* bars subsequent relitigation of an action if

> three questions [can be] answered in the affirmative: First, was the issue decided in the prior adjudication identical with the one presented in the action in question? Second, was there a final judgment on the merits? And third, was the party against whom the plea of *res judicata* is asserted a party or in privity with a party to the prior adjudication?

State v. Magoon, 75 Haw. 164, 190-91, 858 P.2d 712, 725 (1993) (brackets, citation and internal quotation marks omitted). Further, *res judicata*

> precludes the relitigation, not only of the claims that were actually litigated in the first action, but also of all grounds of claim and defense that might have been properly litigated in the first action but were not litigated or decided.

Id. at 190, 858 P.2d at 725 (brackets, citations and internal quotation marks and block quote format omitted). See also Aloha Unlimited, Inc. v. Coughlin, 79 Hawai‘i 527, 537, 904 P.2d 541, 551 (App. 1995).

Chang's second action concerned the same transaction involved in her first action, the 1989 sale of the apartment building; named the same parties identified in the first action, with the sole exception of Joseph Lau as a defendant; and asserted the same causes of action brought in the first action. See Magoon, 75 Haw. at 190, 858 P.2d at 725 ("the judgment of a court of competent jurisdiction is a bar to a new action in any court between the same parties or their privies concerning the same subject matter" (brackets, citations and internal quotation marks and block quote format omitted)). Further, the ground underlying the causes of action in the second action -- the alleged non-disclosure of the presence of asbestos in the building -- was "clearly one that could have been properly litigated in the prior litigation[,]" Aloha Unlimited, Inc., 79 Hawai‘i at 537, 904 P.2d at 551 (footnote omitted), because Chang

was alerted to the asbestos problem during the same month she filed her first action. Thus, the claims Chang asserted in her second action were identical, for purposes of *res judicata*, to those in her first action. Id.; Magoon, 75 Haw. at 190-91, 858 P.2d at 725.

Chang also argues that the court misapplied the doctrine of *res judicata* because the judgment in the first action was not final, see Magoon, 75 Haw. at 190-91, 858 P.2d at 725, inasmuch as her appeal of that action was still pending. In light of our disposition in No. 24428, this is a moot point.

Chang further asserts that the court erred in granting summary judgment on the basis of the statutes of limitations. The court did not grant summary judgment on that basis and, at any rate, our conclusion on *res judicata* renders it unnecessary to reach this point.

We conclude the court did not err in granting the September 27, 2001 motion for summary judgment.

B. The Motion for Award of Attorneys' Fees and Costs.

Chang complains the court abused its discretion in awarding the attorneys' fees the Hos requested pursuant to HRS § 607-14, because their claims were all in tort, and not in the nature of assumpsit. Here again, Chang sought "monetary damages based upon the non-performance of a contractual or quasi-contractual obligation (*i.e.*, breach of contract)[,]" TSA Int'l

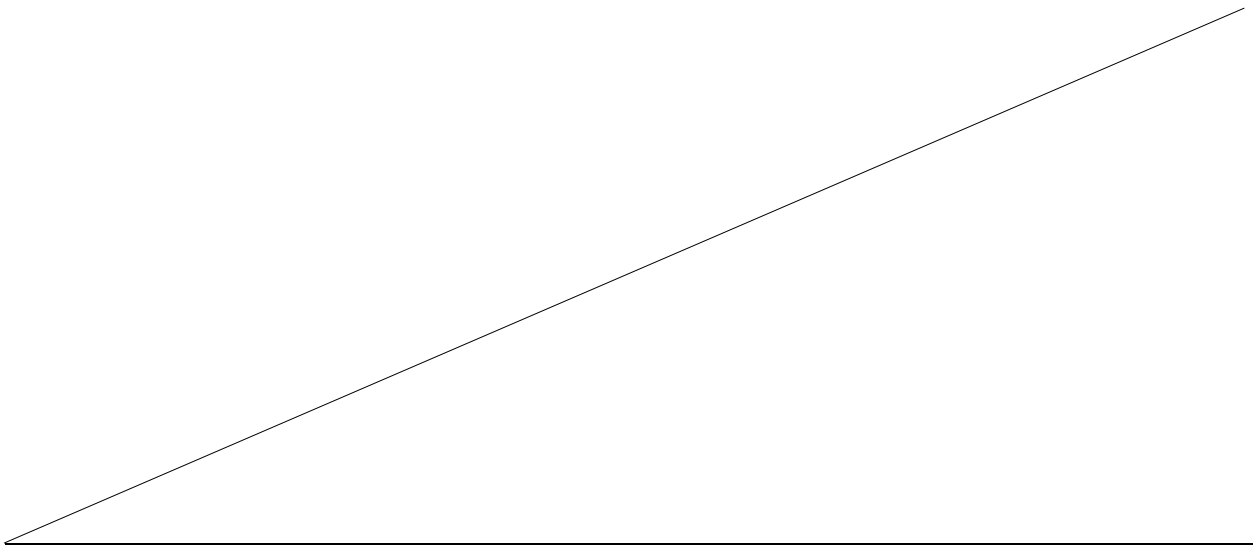
Ltd., 92 Hawai‘i at 264, 990 P.2d at 734, the only difference from the first action being the purported benefit of her bargain -- ownership of a building free of asbestos.

We conclude the court did not abuse its discretion in granting the November 13, 2001 motion for award of attorneys' fees and costs.

III. Conclusion.

In No. 24428, we affirm (1) the June 27, 2001 order that granted the May 15, 2001 motion for summary judgment, (2) the July 25, 2001 order that denied the June 4, 2001 motion to file first amended complaint, (3) the August 23, 2001 order that granted the July 23, 2001 motion for award of attorneys' fees and costs, and (4) the August 23, 2001 judgment.

In 24739, we affirm (1) the November 7, 2001 order that granted the September 27, 2001 motion for summary judgment, and



(2) the December 18, 2001 order that granted the November 13, 2001 motion for award of attorneys' fees and costs.

DATED: Honolulu, Hawaii, July 16, 2003.

On the briefs:

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Acting Chief Judge

Associate Judge

Associate Judge