

NOT FOR PUBLICATION

NO. 25173

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

HARRY FERGERSTROM, Plaintiff-Appellant, v.
KEITH KOHL and JULIANA KOHL, Defendants-Appellees

APPEAL FROM THE CIRCUIT COURT OF THE THIRD CIRCUIT
(CIV. NO. 01-1-162)

MEMORANDUM OPINION

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

Plaintiff-Appellant Harry Fergerstrom (Fegerstrom) appeals from the May 28, 2002 Judgment and the August 13, 2002 Amended Judgment of the Third Circuit Court, Judge Greg K. Nakamura presiding. We affirm.

BACKGROUND

The Lease signed by Fergerstrom, as "Tenant", and Defendants-Appellees Keith Kohl (Keith) and Juliana Kohl (Juliana) (collectively, the Kohls), as "Landlord", on January 1, 2000, states that it is (a) of a two bedroom, one bathroom house in Nānāwale, Pāhoa, Hawaii, (b) for a term of one year commencing on January 1, 2000, and (c) for a rent of \$390 per month payable in advance without any deduction, off-set, or abatement. It further states, in relevant part, as follows:¹

¹ The text of all quoted materials contained within this opinion is as written.

NOT FOR PUBLICATION

6. UTILITIES:

Tenant shall make all arrangements and pay for all water, gas, heat, light, power, telephone and other utility services supplied to the Premises together with any taxes thereon and for all connection charges. Tenant is aware house is on a water catchment system, and that water usage at times must be conserved or water augmented to keep catchment adequately . . . in the event of inadequate rainfall. Tenant agrees to pay landlord for any replacement repair costs

. . . .

10. DEFAULT:

It is agreed between the parties hereto that if any rent shall be due hereunder and unpaid, or if Tenant shall default and breach any other covenant or provision of the Lease, then the Landlord, after giving two (2) days notice, may re-enter the Premises and remove any property and any and all persons therefrom. The Landlord may, at its option, either maintain this Lease in full force and effect and recover all the rent for the entire Lease period, and other charges, or in the alternative, terminate this Lease. In addition, the Landlord may recover all rentals and any other damages and pursue any other rights and remedies which the Landlord may have against the Tenant by reason of such default as provided by law.

. . . .

16. OTHER PROVISIONS AND AGREEMENTS:

Other Provisions and Agreements concerning this Lease between Landlord and Tenant have been agreed upon as noted below:

Tenant deposited \$555 prior to Jan. 2, 2000 - to cover the following 1) \$390 rent payment for Jan 2000 2) \$100 for deposit - bal \$290 due on deposit to be paid at \$100 per month, due at same time as rent each month, beginning Feb. 2000, until pd. in full at \$390 total 3) \$50 deposit for elec. Company for Landlord to establish acct. for premises 4) \$15 to pay for elec. company hook-up fee to premises - therefore 390 + 100 + 50 + 15 . . .

Re: item 6 - Landlord agrees to establish elec. service only, monthly elec./other utilities bills, are not to be Landlords responsibility - Landlord agrees to inform tenant promptly upon receipt of elec. bills , and tenant here agrees to Forward money sufficient to pay all such bills to landlord upon Notice from Landlord that they are due - Tenant agrees to contact landlord at least every 30 days to ensure updates on all elec./utility bills due and promises to pay all due w/in 10 day. All other provisions of item 6 apply and in effect[.]

* stove provided "as is" -

On April 10, 2000, Fergerstrom filed a complaint against the Kohls stating, in relevant part, as follows:

NOT FOR PUBLICATION

Introduction:

On or about December 28th 1999, [Ferberstrom] began negotiations with [the Kohls] for the rental of property located * * * in the Nanawale Estates Pahoia, Hawaii.

On or about 8th of January 2000 [Ferberstrom] entered into formal written lease agreement of one year for above mentioned property.

History

On 8th of January when [Keith] flew in from Honolulu to present a formal lease agreement, [Ferberstrom] mentioned that the current refrigerator was not in proper working order. [Ferberstrom] was told by Keith that the refrigerator would be replaced * * * .

During the following week I contacted the [Kohls] regarding the status of the refrigerator and to inquire about the hook up for the propane gas and the tanks. [Keith] informed me that I had signed an agreement acknowledging that the stove was not in proper working order in that the oven section did not work. I agreed that this was so but that did not include the gas connectors or the gas tanks. [Keith] got irate and told me that if I did not like it I could move and further got abusive with his language. I hung up on him.

During the week of the 20th of January I re-contacted the [Kohls], this time speaking to [Juliana] * * *. We spoke about the refrigerator again. . this time she informed me that a refrigerator was at another tenants home and that arrangements would be made for delivery.

On the 28th of **January I sent the [Kohls] a certified letter** * * * to detail and re-inform the [Kohls] that they had obligations that had not been met. That letter was refused by the [Kohls] and was returned to [Ferberstrom] during the month of March.

On the 17th of February 2000 I was awoken by a member of the State Sheriff's department whom had come to deliver a letter from the [Kohls]. * * * I was informed * * * that the letter was not an official letter for any court but rather a private letter that they were paid to deliver. That letter had several headings. . . this included the violations of lease agreement, termination of lease, notice of trespass, demand for vacation of property within two days, notice of intent to remove, inspection of personal property.

I was a little confused about the sheriff visit as I am abreast of the landlord tenant rights. To further clarify the process I called the State's landlord tenant hotline. I read the letter to the gentleman on the phone further explaining the manner of delivery. He questioned the legality of the papers as they are not for the Court . . . they did not contain a summons to court further that they were contrary to the laws regarding the landlord tenant rights. I explained my concern with this idea, that he had

NOT FOR PUBLICATION

indicated that he was giving me two days to vacate, and that he claimed that he could enter, remove, and inspect my personal property. I was told that he would be in violation of the law if he even attempted to enter my premises without proper notice and consent. Further that I could call the police if he tried and he could be prosecuted for trespass.

Incident:

On or about the 30th of March I went to Kona for a series of community meetings. On Monday the 3rd of April I returned at 11:00 PM to find that my house was occupied with another family. All my personal belongings were gone. * * * They stated that they were the new renters. . . they had a lease and were to inform me that the landlord had removed my belongings and placed them into storage.

Although I was extremely upset with this situation, I had noticed that this new family had a new baby. I told them that I did not want to bother them, but that they were being caught up in something they knew nothing about. I took the liberty to call the police to make a report. * * *

Because of the lateness of hour and the fact that my son has an uncontrolled seizure disorder, I decided to leave and contacted the police to inform them. * * *

In the morning I followed up with first a call to the [Kohls]. I spoke to Keith Kohl. I asked him what he thought he was doing . . . he laughed and said he had lots of money to play with me. I inquired as to where my belonging was. He said that he would not tell me unless I paid him a total of \$1100.00 and sign a release form further action in the courts. He further advised me that I had a total of 13 days before he could legally dispose of my belonging to satisfy his demand for money. When I explained that he was in violation of the landlord tenant code he again laughs and said that I was in violation and that if I had a problem then I could take him to court . . . but regardless he was going to dispose of my personal property.

I further explained to him that my son was handicapped with a seizure disorder and that in my processions was his medicine necessary to help control his disorder. He advised me that until he received the money he demanded and a release form that he would do as he pleased reiterating that I had 13 days left.

Injunctive Relief:

[Fergerstrom] demands that the personal items removed from the property be surrendered to himself immediately and that a complete inventory be made at the [Kohl's] expense. In the alternative that injunctive relief is granted to prevent the defendants from disposing of said property and that an immediate inventory be conducted under the supervision of the State Sheriff's department at the expense of the defendants.

[Fergerstrom] contends that [the Kohls] entered his home on or about the 1st of April 2000 in violation of section 63

NOT FOR PUBLICATION

(Unlawful removal or Exclusion) and section 74 (Retaliatory Eviction) as well as section 73 (Entry without permission) of the landlord tenant code chapter 521 HRS

That all of the personal property of [Ferberstrom's] family was removed from said premises without the permission of [Ferberstrom] in a retaliatory move. Every personal item with the exception of a vehicle was unlawfully removed. The personal items removed were the medicine necessary for the control of the seizures that [Ferberstrom's] son is challenged with as well as medicine necessary to maintain [Ferberstrom's] medical disability. Also included were the law library and the computer system that contains extremely valuable information necessary to pursue judicial relief.

[Ferberstrom] and his son were left with nothing else but the clothes on their backs.. no clothing, food, emergency supplies or cash that was on the premises.

Motion to Proceed in Forma Pauperis:

[Ferberstrom] requests that leave to proceed in Forma Pauperis be granted by the court to include the cost of transcripts. Black's law dictionary state that a Pauper is someone dependent on public funds is allowed to sue or be sued at no expense to himself. Including service fees

Affidavit of Indigence:

[Ferberstrom] contends that he is indigent. That his sole form of financial support comes from the Social Security Supplement Program due to a disability and that his income is only \$510.00 per month.

[Ferberstrom] is aware of the laws pertaining to perjury and makes this claim as true and factual.²

Declaratory Judgement

[Ferberstrom] seek from the court a Declaratory Judgement on the violations of section 63 (unlawful removal or Exclusion) sections 74 (Retaliatory Eviction) section 73 (Landlords entry without permission).

[Ferberstrom] also makes claim that the [Kohls] are residence of the County of Oahu and therefore absentee landlord and has no agent on the island of Hawaii.

(Footnote added; emphasis in original; ". ." and ". . ." are in the original; "* * *" are added to indicate the omission of words

² We conclude that this is not a declaration in lieu of affidavit authorized by Rule 7(g) of the Rules of the Circuit Courts of the State of Hawai'i (2004) because it does not "declare under penalty of law that the [statement] is true and correct."

and/or numbers from the quotation.)

On September 24, 2001, Fergerstrom filed a "General Damages Assessment" in which he alleged his legal entitlement to the following "damages":

1. Pursuant to HRS § 521-44, the costs of the suit and three times the \$290 security deposit for wrongfully retaining the security deposit;

2. Pursuant to HRS § 521-63, the costs of the suit and reasonable attorney fees for excluding the tenant from the premises overnight without cause or court order so authorizing;

3. Pursuant to HRS § 521-74.5,³ \$1,000, for taking possession of a dwelling unit;

4. Costs of suit in the amount of \$515 (30 hours of computer time at \$10 per hour, and one \$215 legal publication);

5. Attorney fee in the amount of \$3,000 (40 hours at \$75 per hour);⁴ and

³ Hawai'i Revised Statutes § 521-74.5 (1993) states as follows:

Recovery of possession limited. The landlord shall not recover or take possession of a dwelling unit by the wilful interruption or diminution of running water, hot water, or electric, gas, or other essential service to the tenant contrary to the rental agreement or section 521-42, except in case of abandonment or surrender. A landlord who engages in this act shall be deemed to have engaged in an unfair method of competition or unfair and deceptive acts or practices in the conduct of any trade or commerce within the meaning of section 480-2; provided that in addition to the penalties available under section 480-3.1, there shall also be minimum damages of three times the monthly rent or \$1,000, whichever is greater.

⁴ Plaintiff-Appellant Harry Fergerstrom (Fergerstrom) included an attorney fee within his "Damages Assessment" notwithstanding the fact that he was not represented by an attorney in the case.

NOT FOR PUBLICATION

1) AUTOMOBILE: 1976 MG CLASSIC	\$ 8,000.00 ⁵
2) HOUSEHOLD ITEMS	\$15,000.00
3) CAMPING	\$ 5,800.00
4) HEIRLOOMS	\$ 4,050.00
5) TOOLS	\$ 6,850.00
6) WOODWORKING	\$16,000.00
7) Books/entertainment/computers	\$21,150.00
8) Religious impliments	\$26,000.00
9) CASH on Hand	<u>\$ 4,000.00⁶</u>
	\$96,850.00

(Footnotes added.)

On March 21, 2002, Defendant Kohls' Motion to Dismiss/Motion for Summary Judgment was filed. This motion was supported by Keith's March 13, 2002 affidavit stating, in relevant part, as follows:

1. . . . On or about January 1, 2000 [Keith] rented the house to [Fergerstrom] ;

2. Fergerstrom failed to pay his monthly rent (\$390.00) for February 2000, and also for March 2000 (another \$390.00). Fergerstrom failed to make any further payments towards his security deposit, and he did not reimburse me for any electric bills as agreed upon.

⁵ Fergerstrom alleged, in his April 10, 2000 complaint, that "[e]very personal item with the exception of a vehicle was unlawfully removed." The record does not reveal the alleged damage to the 1976 MG Classic supporting this "damage assessment".

⁶ In support of this allegation, Fergerstrom submitted an attachment stating as follows:

This shall serve as a declaration that on the premises there was an amount of \$4000.00 cash stuffed in my law books that was to help with my expected move.

One lone of \$2,500.00 was made from my mother during the latter part of the month of March, 2000.

Another amount of \$2000.00 was just received from David and Cyra Lopez for a large rock wall that was completed in the month of march 2000.

Total \$4000.00

NOT FOR PUBLICATION

3. By March 2000, I heard that our house was abandoned, that the house looked trashed, and that I should investigate what had happened to my house. In my last communication with Fergerstrom in February 2000, he told me he was going to move out, and he had apparently abandoned the premises.

4. I found the reports to be true. There was rotting garbage lying around and in the house, cigarette butts and burns were all over the interior of the house, moldy old food was stuck to the carpet, and there was substantial trash and other old and junky household stuff laying around both inside and outside the house. It looked like an abandoned pigsty to me.

5. In conjunction with the non-payment of rent, I concluded that Fergerstrom had abandoned my property, and I had to take measures to secure the property against further break-ins and theft.

6. The premises were cleaned up, and anything that wasn't trash, i.e., which had salvage value, was carefully put into Stuff It Storage, Hilo, Hawaii on April 2, 2000. . . .⁷

7. Meanwhile, I wrote no less than eight (8) notices and letters to Fergerstrom (several of which were addressed to both his Pahoia and Volcano addresses) . . . advising Fergerstrom that his few salvaged personal belongings were stored at Stuff It Storage in Hilo, Hawaii. Several of my letters contained a key to the storage locker located at Stuff It Storage for Fergerstrom to himself recover his few personal belongings which I had found in the abandoned and trashed house.

8. I re-rented our house to other tenants in April 2000, so as to keep it occupied and (hopefully) safe from vandalism or robbery.

(Footnote added.)

On April 9, 2002, Fergerstrom filed a Response to Motion to Dismiss/Summary Judgment. In it, he states:

[Fergerstrom] OPPOSES the Motion to Dismiss/Summary judgment based on the facts in this case. A reminder to this Court that the case at bar is one in which [Fergerstrom] alleges the illegal taking of all of his property by the [Kohls] in an illegal action taken by the [Kohls] in a retaliatory eviction contrary to the Landlord Tenant Code. Thus the illegal taking and subsequent discarding of said property included all records of ownership, photo, medical records, etc. However, [Fergerstrom] remains confident that these proof's will become apparent in the course of the trial before a jury. [Fergerstrom] will produce witnesses far beyond a reasonable doubt to the claims made in the damages

⁷ The Kohls did not file an inventory of the property placed in storage.

assessment.

It would be a travesty of justice to grant a summary judgment based on the inability to produce documents of proof of ownership etc. given the very nature of this action.

Although the record shows that Fergerstrom understood the need for one or more affidavits in support of his allegations, he never filed an affidavit or a declaration in lieu of affidavit.

There was a hearing on April 18, 2002, but a transcript of that hearing is not a part of the record on appeal so we do not know what was and was not said by either of the parties or by Judge Greg K. Nakamura. On May 28, 2002, Judge Nakamura entered an order, in relevant part, as follows:

ORDER GRANTING DEFENDANTS KOHLS' MOTION TO DISMISS/
MOTION FOR SUMMARY JUDGMENT (filed March 21, 2002)

. . . .

The court read Motion and the Opposition thereto, reviewed the records and files of this case, and heard oral argument on the Motion. Having done so, the Court finds that [Fergerstrom] has not properly raised any genuine issues of material fact. Therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that said Motion be, and hereby is, granted.

On May 28, 2002, Judge Nakamura entered a Judgment stating, in relevant part, as follows:

JUDGMENT is hereby entered in favor of Defendants KEITH and JULIANA KOHL herein, and against Plaintiff HARRY FERGERSTROM dismissing all of his claims herein.

There are no further parties, claims or issues left in this case.

On May 31, 2002, Fergerstrom filed a Motion to Reconsider Dismissal/Summary Judgement (May 31, 2002 Motion)

NOT FOR PUBLICATION

alleging, in relevant part, as follows:

1) [Ferberstrom] entered into rental agreement with the [Kohls] in January 2000 for the term of one year.

2) [Ferberstrom] followed the letter of the law (HRS Hawaii Landlord-Tenant Code) and did report to the landlord ([Kohls]) failures to comply with Landlord-Tenant Code, by reporting that the refrigeration unit was not functioning in early January. This report was made via telephone conversations with the [Kohls], who informed [Ferberstrom] that the refrigeration unit would be replaced promptly.

3) [Ferberstrom] continued to pay the full rent for the months of January and February yet still did not have refrigeration. [Ferberstrom] continued to complain. [The Kohls] told [Ferberstrom] to move if I did not like the present condition.

4) Late February, 2000, [Ferberstrom] is delivered an eviction notice by the State Sheriff's Office. . . .

Judicial Notice:

The method that the [Kohls] have been using to avoid this matter from ever being heard is as follows:

1) [The Kohls] have somehow convinced the courts that the premises that was under lease by [Ferberstrom] was **abandoned**. This is totally untrue. The premises was occupied by [Ferberstrom] and his family.

2) [The Kohls] claim that there were reports that premises was abandoned but has offered no evidence to this nor did the [Kohls] ever attempt to contact [Ferberstrom].

3) [The Kohls] claim that they did not take any unauthorized control of any of [Ferberstrom's] property, yet in their own documents they state that [Ferberstrom's] items were stored at a facility in Hilo.

4) [Ferberstrom] can show at trial that the [Kohls] conspired to re-rent the premises before the 1st of April by placing ads in the Hilo Tribune.

The Premises was never abandoned at any time. The [Kohls] made no effort to contact defendant to inquire. In an illegal effort to force a retaliatory eviction the [Kohls] did enter said premises without permission, notice, or court directive and did illegally take and place into storage [Ferberstrom] and his family's belongings.

The matter before this Court is did the [Kohls] take the proper steps according to the Hawaii Landlord-Tenant Code HRS 621 or did they act on their own accord in violation of the Hawaii Landlord-Tenant Code?

THE COURT MUST BEAR IN MIND THAT THE PRESENTATION OF GENUINE

NOT FOR PUBLICATION

MATERIAL FACT HAS BEEN VIRTUALLY ERASED AS THE PREMISE OF THIS ACTION IS THE ILLEGAL TAKING OF ALL MATERIAL POSSESSIONS BELONGING TO [FERGERSTROM]. HOWEVER, [FERGERSTROM] HAS AN ABUNDANCE OF VERY CREDIBLE WITNESSES THAT ARE PREPARED TO TESTIFY TO SUBSTANTIATE ALL CLAIMS MADE BY [FERGERSTROM].

THE COURT SHOULD ALSO CONSIDER THE FACT THAT THE ORIGINAL COMPLAINT WAS FOR INJUNCTIVE RELIEF TO PREVENT THE [KOHLS] FROM DISPOSING OF [FERGERSTROM'S] PROPERTY AND ELIMINATING ALL EVIDENCE OF MATERIAL FACT.

. . . .

The purpose of a summary judgment is to abbreviate the court proceeding designed to eliminate frivolous cases of no merit. The granting of a summary judgment in this case, two years after this action began, based the inability to produce genuine material fact would portray the court to be prejudice and fundamentally unfair to [Ferberstrom] after the Courts having not acted on or denied any of the motions for injunctive relief to prevent the disposal of all genuine material fact and not rendering a decision on a motion for Declaratory Judgment. This position taken by the Courts to insure fundamental fairness to the [Kohls] is now being abandoned when it comes to [Ferberstrom].

Prayer:

It is the prayer of [Ferberstrom] that the Court take the time to consider all the facts thus far presented to the Courts, consider the the irreparable harm perpetrated upon [Ferberstrom] by the illegal actions taken by the [Kohls], consider all the information rendered by [Ferberstrom] on the methods used by the [Kohls] to avoid Process Service, consider the length of time that suffering has had to be endured by [Ferberstrom] and his family without shelter, food, money, or medicines. It is therefore the prayer of [Ferberstrom] that the this dismissal/summary Judgement be recinded and the case placed on the docket for trial at the earliest convience of the court.

[Ferberstrom] is prepared to go to trial and is prepared to bring forth numerous witnesses to substanciate his claims as outlined in the complaint and damages acessment.

(Emphasis in original.)

On June 3, 2002, the Kohls moved for an award of attorney fees and costs pursuant to Hawai'i Rules of Civil Procedure (HRCP) Rule 54(d) and HRS §§ 607-9 and -14. The motion was accompanied by an affidavit from attorney Fred Paul Benco seeking costs of \$430.71 and attorney fees of \$7,200 charged at

the rate of \$180 per hour. On June 12, 2002, the Kohls filed their opposition to the May 31, 2002 Motion.

On June 18, 2002, Fergerstrom filed a notice of appeal of the May 28, 2002 Judgment.

The court did not decide Fergerstrom's May 31, 2002 Motion. This nondecision has no impact on appellate jurisdiction because the Hawai'i Rules of Appellate Procedure Rule 4(a)(3) (2004) states, in relevant part, as follows:

Time to Appeal Affected by Post-Judgment Motions. If, not later than 10 days after entry of judgment, any party files a motion that seeks to reconsider, vacate, or alter the judgment, or seeks attorney's fees or costs, the time for filing the notice of appeal is extended until 30 days after entry of an order disposing of the motion; provided, that the failure to dispose of any motion by order entered upon the record within 90 days after the date the motion was filed shall constitute a denial of the motion.

The notice of appeal shall be deemed to appeal disposition of all post-judgment motions that are filed within 10 days after entry of judgment.

The 90-day period shall be computed as provided in Rule 26.

On August 13, 2002, after a hearing on July 9, 2002, the court entered an Order Granting Defendant's Kohls' Motion for Award of Attorney's Fees and Costs (filed June 3, 2002) in which it awarded attorney fees of \$7,200 and costs of \$430.71.

On August 13, 2002, the court filed an "Amended Judgment" in favor of the Kohls and against Fergerstrom in the sum of \$7,630.71.⁸

⁸ This August 13, 2002 Amended Judgment is not an amended judgment. It is a judgment solely for the combined total of the attorney fees and costs awarded in the August 13, 2002 Order Granting Defendants Kohls' Motion for Award of Attorney's Fees and Costs (filed June 3, 2002).

In his opening brief Fergerstrom states, in relevant part,

Shortly after taking residence, [Fergerstom] noticed that the facilities were not up to par with regards to the cooking facilities, refrigeration, and water catchment. The proper operation of these facilities is mandated as a precondition to RENTAL as specified in HRS 624 and obligatory of the Landlord.

The STOVE was not functioning correctly with three out of the four burners not functioning, no connectors or gas tanks were provided.

The REFRIGERATOR was not functional although the freezer section did work, it had no control for regulation of coolant.

The CATCHMENT did not have a proper drainage system from the roof to the tank.

. . . .

After three months of patiently awaiting corrections for documented problems and suffering from the failure of the [Kohls] to comply with the landlord obligatory requirements, the premises that [Fergerstrom] had leased was illegally broken into, by the [Kohls], with no indication or notice of entry, nor permission did enter and confiscate all personal items of [Fergerstrom] and family. Further illegally took and stored said property at a storage facility in Hilo and re-rented the house. This all occurred during a four day outing to Kona.

(Emphasis in original.)

In his reply brief, Fergerstrom states, in relevant part, as follows:

[Fergerstrom] did pay the rent for both January and February, but did not pay March. [Fergerstrom] has already noted to the court there were obligation that were not met by the [Kohls] and therefore declined to pay for the month of march pending necessary repairs. Note that there was no demand for payment made by [the Kohls]

. . . .

This Court cannot base this entire case on an non sustainable allegation offered by the [Kohls] that the premises in question were abandoned. Again [Fergerstrom] has witnesses to substantiate the claims of [Fergerstrom]. We only ask for our day in Court.

(Emphasis in original.)

NOT FOR PUBLICATION

HRCP Rule 56 (Supp. 2004) states, in relevant part, as follows:

Summary judgment.

. . . .

(c) Motion and Proceedings Thereon. . . . The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. . . .

(d)

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

Rule 7 of the Rules of the Circuit Courts of the State of Hawai'i (2004) states, in relevant part, as follows:

(g) *Declaration in lieu of affidavit.* In lieu of an affidavit, an unsworn declaration may be made by a person, in writing, subscribed as true under penalty of law, and dated, in substantially the following form:

I, _____, do declare under penalty of law that the foregoing is true and correct.
Dated:

(Signature)

DISCUSSION

When a landlord wants to terminate a rental agreement, the landlord usually has to file an action for summary possession

against the tenant. HRS §§ 521-68, -69 and -72 (1993) and § 521-70 (1993). The landlord can avoid much of the time, cost, and aggravation involved in summary possession proceedings, however, in situations where, as stated in HRS § 521-70(d) (1993), "the tenant wrongfully quits the dwelling unit and unequivocally indicates by words or deeds the tenant's intention not to resume the tenancy[.]" HRS § 521-70 (1993) states:

Landlord's remedies for absence, misuse, abandonment and failure to honor tenancy before occupancy. (a) If the rental agreement provides for notification of the landlord by the tenant of an anticipated extended absence and the tenant fails to make reasonable efforts to comply with such requirement, the tenant shall indemnify the landlord for any damage resulting from such absence.

(b) The landlord may, during any extended absence of the tenant, enter the dwelling unit as reasonably necessary for purposes of inspection, maintenance, and safe-keeping or for the purposes permitted by section 521-53(a).

(c) Unless otherwise provided in the rental agreement, use of the dwelling unit by the tenant for any other purpose than as the tenant's abode, or nonuse of the dwelling unit, constitutes a breach of the tenant's obligations under section 521-52 and entitles the landlord to proceed as provided in section 521-72.

(d) If the tenant wrongfully quits the dwelling unit and unequivocally indicates by words or deeds the tenant's intention not to resume the tenancy, the tenant shall be liable to the landlord for the lesser of the following amounts for such abandonment:

- (1) The entire rent due for the remainder of the term; or
- (2) All rent accrued during the period reasonably necessary to rerent the dwelling unit at the fair rental, plus the difference between such fair rent and the rent agreed to in the prior rental agreement and a reasonable commission for the renting of the dwelling unit. This paragraph applies if the amount calculated hereunder is less than the amount calculated under paragraph (1) whether or not the landlord rerents the dwelling unit.

(e) If the tenant unequivocally indicates by words or deed the tenant's intention not to honor the tenancy before occupancy, the tenant shall be liable to the landlord for the lesser of the following amounts:

NOT FOR PUBLICATION

- (1) All monies deposited with the landlord;
- (2) One month's rent at the rate agreed upon in the rental agreement;
- (3) All rent accrued from the agreed date for the commencement of the tenancy until the dwelling unit is re-rented at the fair rental, plus the difference between such fair rent and the rent agreed to in the prior rental agreement, plus reasonable costs, and a reasonable commission for re-renting of the dwelling unit. This paragraph applies if the amount calculated hereunder is less than the amounts calculated under paragraphs (1) or (2), whether or not the landlord re-rents the dwelling unit.

It appears that landlords who want to terminate a rental agreement would prefer the abandonment route over the summary possession route. To do so, however, they must validly present substantial evidence of abandonment.

What is abandonment of a dwelling unit?

In order to establish an abandonment of a leasehold, actual acts of relinquishment accompanied by intention to abandon must be shown. The primary elements are the intention to abandon and the external act by which that intention is carried into effect. While an abandonment may arise from a single act or from a series of acts, the intent to abandon and the act of abandonment must conjoin and operate together, or in the very nature of things, there can be no abandonment. The intention to abandon is considered the first and paramount inquiry, and actual intent to abandon must be shown.

In addition, abandonment of a lease involves a conscious purpose and intention on the part of the owner neither to use nor to retake the property into his or her possession, and necessarily involves an act by which the possession is relinquished, and this must be a clear and unmistakable affirmative act indicating a purpose to repudiate the interest in the leasehold. The act of relinquishment of possession or enjoyment must be accompanied by an intent to part permanently with the right to the leasehold; otherwise there is no abandonment. The moment the intention to abandon and the relinquishment of possession unite, the abandonment is complete, for time is not an essential element of abandonment. Therefore, in any case where a question of abandonment of a lease is involved, the important fact to be determined is what was the intention of the person whose rights are claimed to have been abandoned.

84 A.L.R.4th 183, 192 (1991).

This case was decided by a summary judgment.

NOT FOR PUBLICATION

Fergerstrom's allegations cannot be considered because Fergerstrom never filed an affidavit or a declaration in lieu of affidavit. HRCF Rule 56(e). We conclude that in the absence of any other factual information such as the information contained in the documents filed by Fergerstrom which cannot be considered, Keith's March 13, 2002 affidavit validly presents uncontradicted substantial evidence that Fergerstrom had abandoned the rented premises. Consequently, "there is no genuine issue as to any material fact and . . . [the Kohls are] entitled to a judgment as a matter of law." HRCF Rule 56(c).

CONCLUSION

Accordingly, we affirm the May 28, 2002 Judgment and the August 13, 2002 Amended Judgment.

DATED: Honolulu, Hawai'i, March 4, 2004.

On the briefs:

Harry Fergerstrom, *pro se*
Plaintiff-Appellant.

Chief Judge

Lila Barbara Kanae,
for Defendants-Appellees.

Associate Judge

Associate Judge