NO. 25274

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

WILLIAM J. COOKE, Plaintiff-Appellee, v.
THOMAS A. MARZEC, Defendant-Appellant

APPEAL FROM THE DISTRICT COURT OF THE FIRST CIRCUIT
HONOLULU DIVISION
(Civil No. 1RC01-6954)

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

Defendant-Appellant Thomas Marzec (Marzec) appeals from the August 9, 2002 Amended Judgment entered in the District Court of the First Circuit[1] in favor of Plaintiff-Appellee William J. Cooke (Cooke) and against Marzec in the amount of $3,739.50.

When Marzec filed a notice of appeal on August 14, 2002, appellate jurisdiction attached and the district court no longer had jurisdiction to add a $300.00 sanction to the August 9, 2002 Amended Judgment and to enter its September 17, 2002 Second Amended Judgment in favor of Cooke in the amount of $4,039.50.

We affirm the August 9, 2002 Amended Judgment and declare that the September 17, 2002 Second Amended Judgment is void.

[1] Unless otherwise stated, the Honorable David L. Fong presided.

BACKGROUND

On June 25, 1998, on a Hawaii Association of Realtors 1983 standard form "Rental Agreement", Marzec and Cooke entered into a rental agreement whereby Marzec leased a "3 Bedroom - 2 Bath house and yard at 117 Aikapa Pl., Kailua HI" (the residence) from Cooke. The term was for six (6) months expiring on January 13, 1999. The rent was $1,600 per month, and Marzec made an advance security deposit in that same amount. When the original lease term expired, Marzec became a month-to-month tenant.

During the month of July 2000, Cooke began making repairs to the residence, including its roof that was old but not leaking. Marzec testified that he was greatly disturbed by Cooke's action and "I knew . . . when we had these roofing discussions that . . . it was going to take a lot of my time. I was pro se in my divorce case, and I had to meet these deadlines. So I was very insistent . . . that either the rental cost not go up, or they take actions to minimize the effect on me." Marzec also testified that he told Cooke before the roofing work began "that if the rent goes up more than a hundred and fifty dollars, I need to know then so that I could move out". In Marzec's words, "Cooke understood [Marzec's] desire for privacy and minimal disruption." According to Marzec,

> what happened was, they got contractors to do the estimates on the roof. The prices evidently were excessive for them. So they

ended up doing a large part of it themselves, scrapping the gravel off a pitch and gravel roof with implements. They're not trained. They admitted they damaged a portion of the roof.

And for the two weeks when I had taken leave to prepare for these pretrial deadlines [in his divorce case], they were scrapping [sic] and banging on the roof, and there was all sorts of stuff falling between the slats. So at the end of the day, I literally had to vacuum the bed. I had to vacuum the kitchen. I had to vacuum the dining table, because the whole house was like that and everything fell down.

I complained to them saying, "You told me you were going to respect my privacy. All this stuff is falling in my house. You're banging. You're scrapping [sic]. I can't get anything done during the day." And their -- their response was to give me some plastic to put over . . . all my property. I'd have to cover the whole house.

So what I ended up doing was covering the dining area, because I had to eat there. And I live [sic] like that for a while, because things continued to fall even after the roofing job was done. That was the first time that they promised something that they did not come through on.

Then the final rent ended up being eighteen hundred dollars. . . . So they took over yard responsibilities, and they didn't take care of the yard. . . . And the place was really going downhill.

I had complained about the mold back in July of 2000. . . .

. . . .

. . . I complained again in November and again in February, and March, saying, "This is a problem." . . .

. . . .

. . . And this is in Aikahi. It's a nice neighborhood.

I'm paying eighteen hundred dollars a month for a three bedroom, two . . . bathroom house, and they're not keeping it up after taking over the yard maintenance, after making certain promises they're going to come over and paint and take care of the black mold problem.

Black mold is a significant issue. . . .

I twice went to military medical complaining about chronic fatigue. . . . And it wasn't until later that I . . . drew the conclusion that . . . I was very significantly affected by the mold . . . and it had gotten into places and was bothering me.

THE COURT: Is that what your physician told you?

MR. MARZEC: No. . . . I reached a conclusion after I moved out, because all these symptoms disappeared.

> . . . .
>
> No. The physician did not connect - - I did not complain about the black mold. I didn't bring it up as an issue, because, again, I pointed more towards the divorce and other things.
>
> . . . .
>
> . . . I asked [Cooke] to come over in May 4th [sic] of 2000, anytime to fix the black mold problem. He did not. He did not do anything until I physically withheld the rent, and I got estimates for two contractors in order to come in and have them do the job. At which point when I relay [sic] that to him, he got very upset that I was going to hire somebody else to do -- to do this work.
>
> THE COURT: Well, that's proper, right? That's what the Landlord Tenant Code says you're suppose[d] to do.
>
> MR. MARZEC: That's correct.
>
> THE COURT: But that wasn't done in 2000.
>
> MR. MARZEC: It wasn't done in 2000. No.
>
> . . . .
>
> . . . I did not pay the two-hundred-dollar increase in June of 2001, 'cause it was not proper. It was a retaliatory rent increase based on my complaints.
>
> The Landlord Tenant Code allows for a landlord -- gives him 60 days to pursue payment of back rent. If it is not done within 60 days, then the -- for a holdover tenant, the previously agreed upon rent is the rent for the rental unit. Therefore, as Mr. Cooke admitted, after June of 2001, he never ask[ed] for back rent. He took no action to collect back rent.
>
> And by the time he gave me notice of the eviction, which is now August 26, that exceeded . . . the 60 days from June . . . when I did not pay . . . his rental increase.

Cooke testified that Marzec's rent was $1,600.00 per month until, starting in 2000, Cooke raised Marzec's rent "in three separate increments of [a] hundred dollars, a hundred dollars, and two hundred dollars." The last increase occurred when, in April 2001, Cooke "provided notification [to Marzec] that beginning the 1st of June, 2001, [Marzec's] rent would be two thousand dollars a month." Marzec indicated that he was not

happy with this increase and did not believe the property was worth that much and that he was actively looking for a new property, but when Cooke asked if he intended to vacate the property, "[Marzec] said no. He would give appropriate notice."

On May 28, 2001, Marzec sent a three-and-one-half-page, single spaced, typewritten letter to Cooke. In the letter, Marzec stated the history of his relationship with Cooke, including the fact that Marzec had "registered formal written complaints with the Hawaii State Department of Health and the State of Hawaii Office of Consumer Protection concerning this ongoing black mold problem." The letter ended as follows:

> Since your latest rent increase, I asked you on May 4, 2001, in person, why you raised the rent. You told me that you raised the rent "to cover increased costs". When I asked what "increased costs", you did not reply. I then stated that I would subpoena any records related to your alleged increased costs, and you replied that the records were "none of my business". You later said that you raised the rent because you "run a business". You asked if I was giving notice for moving out and I replied "no". I asked when you would take care of the black mold problem and you replied when "you [Marzec] wanted" - I replied "anytime".
>
> I have requested, in good faith, that you perform repairs to the rental. Because you have repeatedly failed to act in good faith in the performance of your duties, I am documenting existing problems with the rental at 117 Aikapa Place. This summary of known problems is enclosed. Fix these problems professionally and immediately. Specifically, you have failed to maintain fit premises at 117 Aikapa Place in accordance with RLTC §521-42 and your latest rent increase is simply retaliation. I am getting comprehensive estimates so the necessary repairs can be performed in a competent and timely manner. Repair costs will be subtracted from the rent.
>
> The repair cost estimates for just the enclosed problems #1 and #4 will be approximately one month's rent. Therefore, pursuant to RLTC §521-64, because total correction and repair costs can be equal to three months rent, I am using the June rent to perform repairs necessary to make the rental safely habitable.
>
> You should know that I am consulting with an attorney (recommended by my next door neighbor) and I will defend my full

> legal rights. I am prepared to have my attorney protect me against any further retaliatory measures, and any hostile or illegal actions affecting the rental, my personal property or me.

Attached to the letter was the following list:

> Problems Requiring Repair at 117 Aikapa Place
>
> 1. disinfect then seal/paint over all of the black mold/fungus on the lanai structure, inside and outside and on the outside of the dining area addition.
> 2. remove all roof gravel and tar piles from around the house.
> 3. Install/fix window screens from the lanai to the house jalousies(3). Make them gecko-proof.
> 4. fix and paint the lanai screen frames and fix the screens.
> 5. fix the exterior house window screens and rotting frames(except for 1 screen with the air conditioner). Make all of these gecko-proof.
> 6. paint the exterior of the house.
> 7. install gutters and downspouts.
> 8. install the carport storage doors(2).
> 9. perform yardwork on a regular schedule, every 2 weeks(cut grass, trim hedges, pick up bag&remove fallen leaves/branches/plants), between 0900 and 1600.
> 10. fix the tile area by the front door; permanently remove the grass between tiles.
> 11. permanently remove all of the grass/weeds growing in the driveway.

On June 2, 2001, Cooke responded in a letter stating, in relevant part, as follows:

> As we discussed this afternoon, my wife will be coming by Sunday morning, 3 June to begin to bleach and wash the mildew on the lanai room and the exterior of the dining alcove. Thank you for your immediate permission to begin to address this problem. As we discussed, we know that bleaching and washing will be a messy, disruptive process, and that given your discomfiture during our re-roofing we were reluctant to re-engage with longer term activities while you still occupied the house.
>
> Nevertheless, as noted in Section 64 of State of Hawaii Landlord Tenant Code, rent may only be withheld ***IF*** we do not commence repairs within five (5) business days (for conditions affecting health and safety) or twelve (12) business days (for other repairs). Given that you have notified us in writing, and given permission for us to begin to bleach and wash the mildew, and that we have scheduled our work on this item, you may not continue to withhold the rent.
>
> Please pay the rent in full by 4 June 01, or you will be are [sic] overdue and the $20.00 late payment service charge (stipulated in Section 7 of your lease) will be applied.
>
> Please also note, that under Section 68 State of Hawaii Landlord Tenant Code, if we do not receive full payment of the

> rent the rental agreement may be terminated, and we may sue to evict you. Section 68 of the State of Hawaii Landlord Tenant Code allows termination for non payment, particularly as we are responding to your repair concerns upon being detailed in writing. Section 74 of the State of Hawaii Landlord Tenant Code prohibits retaliatory evictions only so long as the ". . . tenant has paid and continues to pay the rent on time . . ."
>
> You also listed ten (10) other concerns including repairing screens as well as improvements such as painting the exterior of the house and installing gutters and downspouts. We will begin those which are repairs when we have completed the mildew treatment. Improvements to the property are at the discretion the [sic] landlord, and we will address our long-term scheduling for various improvements with you separately.

Cooke testified that he

> responded by pointing out to Mr. Marzec that we had earlier asked him for some guidance as to how we could perform these types of work in and around the property with his dog loose in the backyard. And he had not given us any written or verbal indication how we could do that, no indication when he would be taking leave, no indication when he might be off the property, off the island, no indication when he would be home and taking the dog inside, no guidances [sic] as to how we could work safely and securely around the property.
>
> . . . .
>
> Mr. Marzec had indicated that he had looked into mildew washing and repainting on his own, and that he intended to withhold the entire amounts rent [sic]. I told him that the Hawaii Landlord Tenant Code did not allow withholding of rent unless the landlord was given an appropriate amount of time to . . . commence the repairs.
>
> We commenced the repairs and in that period of time. We washed the mildew down, bleached it off, repaired some screens, and indicated to Mr. Marzec that other items on his list were . . . long-term improvements . . . not germane to the repairs he requested.

Marzec paid $1,800.00 per month rent for the months of June, July, August, and September of 2001.

On August 26, 2001, Cooke gave Marzec more than forty-five-days written notice that Marzec's month-to-month tenancy at the property would be terminated on October 15, 2001. Marzec responded by letter dated September 16, 2001, in relevant part,

as follows:

> I am in receipt of your August 26, 2001 letter. I am asking you to reconsider your position. A check for $800 is enclosed, which represents the rent payment increase of $200 from June-September 2001. In addition, I will make monthly rent payments of $2,000.
>
> If you are adamant about terminating the lease, then I ask you to provide me with more time to move out. Recent events at work have compounded my difficulties in meeting several deadlines, and a move in October 2001 would be very disruptive.

Although Cooke did not provide Marzec with more time to move out, Marzec did not exit the residence on October 15, 2001.

PROCEDURAL HISTORY

On October 16, 2001, Cooke filed a complaint asking the court for a writ of possession, directing the Sheriff to remove Marzec and his personal belongings from the property. Marzec filed a motion for continuance, and Cooke agreed to a short continuance "of two or three days". The court granted the motion on October 29, 2001 and continued the case until November 29, 2001 on the condition that Marzec "deposit into the Rent Trust Fund the amount of $1,600 on or before 11/5/01 by 12 noon[.]"

In a letter dated November 1, 2001, Marzec wrote to Cooke as follows:

> Please provide me with receipts of all rent (and the security deposit) paid, including amount and date paid, from June 1998 to the present, within 10 days.
>
> The papaya tree by the macadamia nut tree fell last night. Evidently, the high winds were the cause. Please remove the tree and all other accumulating yard debris, and continue to do so on at least a monthly basis. You have not competently performed any of the repairs I requested in writing per my May 28, 2001 letter to you, and you did not even attempt most of the repairs. Yet, in your June 2, 2001 letter to me, you stated that you would address their scheduling with me. Please perform the repairs and explain your actions and intentions.

> Your repeated entry to the back yard by the fenced off dining area addition, vice [sic] normally through the gate, has damaged the fence and allowed my dog to escape repeatedly. When this first occurred, I put up a wooden barrier to prevent my dog from escaping and to prevent such access. This wooden barrier was repeatedly moved and you continued to enter the back yard by climbing over and damaging fence. I then put up an additional huge cardboard barrier to prevent access and to prevent my dog from escaping. Both the wooden and cardboard barriers were moved as you continued to access the backyard through this area. Your actions conditioned my dog to escape from the back yard through the fence you damaged. Now, evidently, the window screen next to this damaged fence has been torn. Please competently repair the fence you damaged so that my dog does not escape and also repair the window screen. I do not understand why you do not use the gate to enter the backyard.
>
> The November 2001 rent check for $1,800 is enclosed.

On November 1, 2001, Marzec filed an answer. On November 9, 2001, Marzec filed an amended answer in which he asserted "that Cooke neglected to pursue alleged claims and waived any rights thereof", a "failure of consideration per all rental agreements", a "breach of the implied warranty of habitability and breach of the implied covenant of quiet enjoyment, "fraud and misrepresentation", "equitable and promissory estoppel", "retaliatory rent increases", "retaliatory eviction", failure to provide written notice of the "alleged rent due and/or other liabilities", and failure to state a claim upon which relief can be granted.

On November 9, 2001, Marzec, proceeding pro se, filed a counterclaim alleging violations of the Hawai‘i Residential Landlord-Tenant Code and seeking judgment for the following:

a. roof issues - $800
b. yard issues - $500
c. black mold issues - $1,500
d. various repair issues - $600
e. attorney's fees through June 30, 2001 - $2,114

> f. attorney's fees since June 30, 2001 - not yet known
> g. dog sitting fees - $180
>
> Total (known and estimated) - $5,694.

In a letter dated November 28, 2001, Marzec wrote to Cooke as follows:

> Your repeated willful and negligent failures to perform per rental agreements, arrangements and the Hawaii Residential Landlord-Tenant Code ("RLTC") are characterized by:
>
> a. failure to make all repairs and arrangements necessary to put and keep the rental in a sanitary and habitable condition;
>
> b. failure to competently perform requested and necessary repairs;
>
> c. a breach of the implied warranty of habitability and implied covenant of quiet enjoyment; and
>
> d. deprivation of a substantial part of the benefit and enjoyment of my bargain under the rental agreement.
>
> In particular, the black mold/fungus I first complained about in July 2000 has started to re-grow significantly within the lanai rafters and the piles of roof gravel around the rental (and associated plugged drainage pipe) have caused the back yard to flood extensively (again) during the recent heavy rains this week. Furthermore, none of the required repairs detailed in my May 28, 2001 and November 1, 2001 letters to you have been competently completed and most were not even attempted. You failed to respond, in any way whatsoever, to my November 1, 2001 letter to you and you did not provide the requested rental payment receipts.
>
> Therefore, per RLTC §521-63, I am terminating the rental agreement effective 2400 on December 7, 2001. Return my security deposit, per RLTC §521-44, by mailing me the check at the above listed letterhead address.

Cooke took possession of the residence on December 8, 2001.

On December 24, 2001, Marzec filed "Defendant's Motion for Leave to File a Supplemental Counterclaim, to Continue Trial or Grant a Stay and to Join Lois J. Cooke as Co-Plaintiff". Lois J. Cooke is Cooke's wife and co-owner of the residence rented by Marzec. On December 27, 2001, the court orally granted the motion and set trial to occur on March 14, 2002.

On March 13, 2002, a "Stipulation and Order to Change Venue" was filed moving the trial from the Koʻolaupoko Division to the Honolulu Division and scheduling a pretrial conference to occur on March 25, 2002. At that conference, the trial was scheduled to happen on May 22, 2002.

By letter dated April 5, 2002, Marzec wrote to counsel for Cooke as follows:

> I intend on taking Mr. Cooke's deposition. Prior to issuance of the subpoena, can you provide a mutually convenient time and date? I am available April 11, 12, 15 or 16, between 1000 and 1600. I expect the deposition to take no more than 2 hours. If desired for your convenience, the deposition can occur at your offices. Please advise by April 8, 2002.

On May 15, 2002, a week before the trial was scheduled to begin on May 22, 2002, Marzec moved for a continuance of the trial. His motion noted that there had been two prior continuances. In an accompanying memorandum, he stated, in relevant part, as follows:

> A trial continuance is necessary because [Cooke] has obstructed discovery, failed to answer relevant deposition questions and refused to provide any subpoenaed documents pursuant to his deposition. [Cooke's] deposition has not yet been transcribed, and until all discovery issues are resolved, [Marzec] is not ready to proceed to trial.
>
> This is not a simple summary possession action. . . .
>
> . . . .
>
> Given that the Hawaii Supreme Court has held that retaliatory eviction is an affirmative defense for summary possession proceedings and that a tenant may assert equitable defenses in a landlord's action for summary possession, [Marzec] needs to complete discovery in order to be in a position to go to trial in a meaningful manner.
>
> [Cooke], and his former attorney, have been very secretive and contradictory regarding claims and defenses. . . . [Cooke's] attorney claimed he was not available and that the deposition would have to be delayed until May 2002. Then, on April 25, 2002,

> [Cooke's] attorney lodged a Motion to Withdraw as Counsel. Although [Cooke] was still represented by counsel because the motion to withdraw was not approved until May 8, 2002, [Cooke's] counsel did not appear for [Cooke's] deposition on May 6, 2002. In essence, [Cooke] took actions to delay his deposition by one month, claiming his counsel was not available, when in fact his counsel did not appear anyway and moved to withdraw from the case. Further, [Cooke] refused to produce any of the subpoenaed documents pursuant to his deposition.
>
> . . . .
>
> The deposition transcript should be available for [Cooke's] review by May 24, 2002. Discovery requests will also be served on [Cooke]. By June 26, 2002, [Marzec] should be in a position to either compel discovery, if necessary, or to participate in a status conference. Regardless, rather than scheduling a trial date, [Marzec] requests the scheduling of a Rule 16 Status Conference for July 1, 2002. This status conference can aid in resolving any remaining issues, and then this case can be scheduled for trial.

On May 22, 2002, the court denied his motion and proceeded as scheduled.

At the trial on May 22, 2002, Marzec appeared pro se and, in relevant part, the following was stated on the record:

> THE COURT: Okay. Now, are you ready to take the witness stand?
>
> MR. COOKE: Yes, I am.
>
> . . . .
>
> MR. MARZEC: Your Honor, I have some preliminary matter [sic].
>
> . . . .
>
> I submitted an amended counterclaim today for additional damages that was allowed previously at a previous hearing. I don't know if that's reached you or not, but that should be considered as part of this case.
>
> I also, again, your Honor, request a stay pursuant to the Soldier Sailor's Civil Relief Act as my military duties have adversely affected my ability to prepare for this, and I cannot make a meaningful defense. So I again ask for a stay.
>
> THE COURT: Denied.
>
> . . . .

> MR. MARZEC: And the issue concerning the amended counterclaim, your Honor?
>
> . . . .
>
> I lodged it this morning.
>
> THE COURT: It's untimely.

A "District Court, First Circuit, Civil Division" file stamp indicates that the Amended Counterclaim was "Lodged" in the record on May 22, 2002. The Amended Counterclaim alleged misrepresentation, breach of rental agreement, and breach of the implied warranty of habitability and implied covenant of quiet enjoyment damages of $3,580, moving costs of $1,941, and legal and other fees and costs of $3,354. In a footnote, it is noted that Marzec's "deposition of Plaintiff costs, and the costs of reconvening the deposition are not yet known[,]" and sought a refund of the $1,600 security deposit. Although these allegations totaled $10,475, the request was for a $15,000 judgment plus costs, interest and a reasonable attorney fee.

During the course of the trial, Marzec attempted to establish a cause-effect relationship between his complaints of chronic fatigue and the black mold problem. However, he was his only witness. The court eventually denied this counterclaim stating that "there was no evidence presented with regard to the counterclaim in terms of how much, if any, damages [Marzec] is seeking[.]"

On June 4, 2002, the court entered its Judgment in

favor of Cooke and against Marzec in the amount of $4,139.00 ($4,466 principal, plus $1,116 attorney fee, plus $100 costs of court, plus $25 Sheriff's fees, plus $32 Sheriff's milage, minus $1,600 Rent Trust Fund). On June 17, 2002, the court entered its Order Granting Plaintiff's Motion to Release Rent Trust Funds.

On June 17, 2002, Marzec filed a Motion to Disqualify Judge David Fong. In support of his motion, Marzec alleged that "Judge Fong's behavior has demonstrated a strong personal prejudice and bias in Landlord-Tenant matters which favors a Landlord receiving 'lucrative' rents above other equal or more important considerations." Marzec complained about the denial of his May 22, 2002 Motion for Continuance. Marzec alleged that "Judge Fong acted as an advocate for [Cooke] during trial. Judge Fong misinterpreted the RLTC and its application." Marzec argued that Judge Fong "is an ethically-challenged judge and his presiding over any matter as a judge raises serious questions of impartiality, impropriety, prejudice, bias, and conflict of interest." In support of his motion, Marzec included three newspaper articles (dated July 6, 2000, July 8, 2000, July 17, 2000) and three letters (dated July 12, 2000, July 13, 2000, July 21, 2000) to the editor of the Honolulu Star-Bulletin that concerned real estate Judge Fong and his wife owned and rented from 1991 until 1998. Finally, Marzec argued that "[i]n addition to HRS § 601-7 allowed disqualifications, a broader inquiry may

be made to determine whether circumstances fairly give rise to an appearance of impropriety and reasonably cast suspicion on the judge's impartiality." On July 15, 2002, Judge Fong denied this motion.

Also on June 17, 2002, Marzec filed a "Motion for a New Trial or to Alter Judgment, a Stay of Judgment and Entry of [Findings of Fact and Conclusions of Law]". Marzec argued that Judge Fong should have been disqualified or should have recused himself from the case, and that Marzec was denied due process to present a meaningful case at trial. On July 23, 2002, the request for entry of findings of fact and conclusions of law was granted, the request to alter judgment was declared moot and, in all other respects, the motion was denied.

The court's Findings of Fact and Conclusions of Law, filed on July 25, 2002, state, in relevant part, as follows:

> FINDINGS OF FACT
>
> 1. [Thomas] and [Lois] (hereinafter "Cooke") are the owners of [the residence].
>
> . . . .
>
> 3. . . . During the month to month tenancy various repairs including a re-roofing of the residence were made. Rent was raised on several occasions during the year 2000, the last occasion was in April of 2001, when Marzec was informed that commencing June 2001, the rent was being increased to $2000.00, per month. Marzec was unhappy with the increase in rent to $2000.00, but did not give notice that he was vacating the premises.
>
> 4. Marzec subsequently gave written notice that there were repairs that were needed and had not been completed by Cooke, and Cooke responded by asking Marzec how the repairs could be done safely while Marzec's dog was loose on the premises. Marzec responded by informing Cooke that he would take care of the repairs and was going to withhold rent. Cooke did the repairs

within a short time thereafter. Marzec then made four payments of rent in the amount of $1,800.00 per month. On August 26, 2001, Cooke then informed Marzec that his month to month tenancy was going to be terminated. Marzec then agreed to pay the rent at the rate of $2,000.00 per month, and Cooke agreed to allow Marzec to stay until October 15, 2001. Marzec did not vacate the premises on October 15, 2001, and on October 16, 2001, Cooke filed their complaint for summary possession. Cooke did not obtain possession of the property until December 8, 2001.

5. Marzec testified that he had notified the building department about deficiencies in the property, however no citations were issued and there was no contact initiated with Cooke by the building department regarding any deficiencies.

. . . .

7. Marze[c] complained of black mold in the premises, but produced no evidence as to any damages suffered as a result of the black mold problem and the mold problem was subsequently corrected by Cooke, shortly after he was notified in writing of the problem by Marze[c].

. . . .

CONCLUSIONS OF LAW

1. The monthly rent for the premises . . . from June of 2001 thru the end of the tenancy was $2000.00.

2. During the months of June, July, August, and September, Marze[c] paid rent at the rate of $1800.00, however[,] since no demand was made for any rental arrearage prior to June of 2001, Cooke waived the claim for the $200.00 per month for those months.

. . . .

4. Since Marze[c] did not pay any rent after October 15, 2001, as a holdover tenant, Marze[c] is in arrears in the following amounts as a holdover tenant (double rent rate of $2000.00 per month):

October	16 - 31	$1000.00
November	1 - 30	4000.00
December	1 - 8	1066.00
Balance		$6066.00
Less Security Deposit		($1600.00)
Balance due		$4466.00

Marze[c] has deposited an additional $1600.00 in the rent trust fund and he shall be given credit for that amount against the balance due which leaves a final balance of $2866.00. [Cooke] is entitled to attorney's fees incurred up to twenty five per cent of the final balance which amounts to $716.50, plus court costs.

5. Marze[c] failed to present evidence sufficient to support any finding of retaliatory eviction or that he had suffered

> damages in any amounts and therefore the counterclaim is dismissed with prejudice.

On June 27, 2002, Marzec filed a "Motion to Stay or Vacate the Judgment Filed June 5, 2002 and the Order Granting Plaintiff's Motion to Release Rent Trust Funds Filed June 17, 2002." This motion was denied on July 15, 2002.

On August 9, 2002, the court filed an Amended Judgment in favor of Cooke and against Marzec in the amount of $3,739.50 ($2,866 principal, $716 attorney fee, $100 costs of court, $25 Sheriff's fees, and $32 Sheriff's mileage). In other words, the principal amount was reduced by the $1,600 paid from the Rent Trust Fund.

On August 14, 2002, Marzec filed (1) a notice of appeal of the August 9, 2002 Amended Judgment and (2) a Motion for Discovery for Deposition and to Compel Discovery. The motion was heard on September 3, 2002. The record does not contain a transcript of this hearing. It appears that, at this hearing, the court orally sanctioned Marzec in the amount of $300. On September 17, 2002, more than a month after Marzec filed a notice of appeal of the August 9, 2002 Amended Judgment, the court entered its Second Amended Judgment, which added to the judgment $300.00 in "Sanctions Awarded September 3, 2002[.]"

This appeal was assigned to this court on June 18, 2003.

POINTS OF ERROR

Marzec raises the following seven points of error on appeal:

1. "Trial Judge Abused His Discretion by Not Continuing the Trial; Not Allowing Marzec to Complete Required and Relevant Discovery; and Not Holding a Pre-Trial Conference; Thereby Wrongly Depriving Marzec of His Constitutional Due Process Rights."

2. "Trial Judge Wrongly Failed to Consider Marzec's Amended Counterclaim at Trial; Wrongly Denied the Counterclaim and the Court Wrongly Denied Marzec's Filing of this [sic] Amended Counterclaim."

3. "The Court Wrongly Forced Marzec to Make a Deposit into the RTF [Rent Trust Fund], the Trial Judge Entered a Wrong Judgment Against Marzec, Which Also Did Not Even Reflect the Oral Judgment Recited at Trial by the Judge, and Wrongly Released Marzec's RTF Deposit to Cooke."

4. "[Findings of Fact nos. 4a, 4b, 5 and 7, and Conclusions of Law nos. 1, 2, 4 and 5] Were Either Erroneous, Wrong or Inadequate."

5. "Trial Judge Wrongly Failed to Recuse or Disqualify Himself."

6. "Trial Judge's Bias, Prejudice, Discrimination, Impropriety and Lack of Impartiality was Prejudicial to Marzec; Thereby Wrongly Depriving Marzec of a Fair Trial and Hearings."

7. "The Court Abused its Discretion in Denying Marzec Post-Trial Discovery and Wrongly Sanctioned Marzec, as Evidenced by a Clearly Erroneous and Wrong [Finding of Fact/Conclusion of Law]."

STANDARDS OF REVIEW

A. Motion for Continuance

The Hawai‘i Supreme Court has stated that "[a] court has the discretion to grant or refuse a continuance of a proceeding in the orderly administration of justice. This discretion is a judicial one and is subject to review for abuse." Sapp v. Wong, 62 Haw. 34, 41, 609 P.2d 137, 142 (1980) (citations omitted). "Generally, to constitute an abuse it must appear that the court clearly exceeded the bounds of reason or disregarded rules or principles of law or practice to the substantial detriment of a party litigant." Coyle v. Compton, 85 Hawai‘i 197, 209, 940 P.2d 404, 416 (App. 1997) (quoting Sapp, 62 Haw. at 41).

B. Findings of Fact and Conclusions of Law

This court reviews "a trial court's findings of fact under the clearly erroneous standard." Robert's Hawaii Sch. Bus, Inc. v. Laupahoehoe Transp. Co., Inc., 91 Hawai‘i 224, 239, 982 P.2d 853, 868 (1999) (citation omitted). A finding of fact is clearly erroneous when "the record lacks substantial evidence to support the finding." Alejado v. City and County of Honolulu, 89

Hawai‘i 221, 225, 971 P.2d 310, 314 (App. 1998) (citation omitted). "We have defined 'substantial evidence' as credible evidence which is of sufficient quality and probative value to enable a person of reasonable caution to support a conclusion." Roxas v. Marcos, 89 Hawai‘i 91, 116, 969 P.2d 1209, 1234 (1998)(citation omitted). "A finding of fact is [also] clearly erroneous when, despite evidence to support the finding, the appellate court is left with the definite and firm conviction in reviewing the entire evidence that a mistake has been committed." Id.

Our appellate courts review conclusions of law de novo, under the right/wrong standard. Robert's Hawaii, 91 Hawai‘i at 239. Under the right/wrong standard, this court will examine the facts and answer the questions presented without giving any weight to the trial court's answer to it. Id.

C. Judicial Bias and Judicial Disqualification

The Hawai‘i Supreme Court has stated that

> [i]n the administration of justice by a court of law, no principle is better recognized as absolutely essential than that [in] every case, be it criminal or civil, . . . the parties involved therein are entitled to the cold neutrality of an impartial judge. The right of litigants to a fair trial must be scrupulously guarded.

Aga v. Hundahl, 78 Hawai‘i 230, 242, 891 P.2d 1022, 1034 (1995) (citation and quotation marks omitted). The supreme court has also said, however, that "reversal on the grounds of judicial bias or misconduct is warranted only upon a showing that the trial was unfair." Id. (citations omitted). "Unfairness, in

turn, requires a clear and precise demonstration of prejudice[,]" standing alone, mere erroneous or adverse rulings by the trial judge do not spell bias or prejudice. Id.

This court has noted that Hawaii Revised Statutes (HRS) § 601-7(b) requires that "a judge shall be disqualified whenever a party files a legally sufficient affidavit showing bias or prejudice but contains the critical requirement that the affidavit be timely filed before the hearing or the action or proceeding and, if not, that good cause shall be shown." Yorita v. Okumoto, 3 Haw. App. 148, 152, 643 P.2d 820, 824 (1982).

"Decisions on recusal or disqualification present perhaps the ultimate test of judicial discretion and should thus lie undisturbed absent a showing of abuse of that discretion." TSA Int'l Ltd. v. Shimizu Corp., 92 Hawai‘i 243, 252, 990 P.2d 713, 722 (1999) (quoting State v. Ross, 89 Hawai‘i 371, 375, 974 P.2d 11, 15 (1998)).

D. Motion to Compel Discovery/Sanctions

"The extent to which discovery is permitted under [Hawai‘i Rules of Civil Procedure (HRCP)] Rule 26 . . . is subject to considerable latitude and the discretion of the trial court." Wakabayashi v. Hertz Corp., 66 Haw. 265, 275, 660 P.2d 1309, 1315-16 (1983) (citation and brackets omitted). A court's "imposition of a discovery abuse sanction" is also reviewed on appeal for an abuse of discretion. Kawamata Farms, Inc. v.

United Agri Prods., 86 Hawai‘i 214, 241, 948 P.2d 1055, 1082 (1997). Thus court's are given "broad discretion in determining the sanctions to be imposed pursuant to [HRCP] Rule 37(b)(2)." Id.

DISCUSSION

A. Denial of Marzec's Motion for Continuance

Marzec's first point is that the district court abused its discretion in denying his pre-trial motion to continue trial. Specifically, Marzec wanted a continuance because he was "not being allowed to complete discovery and . . . not being able to present a meaningful defense at trial." As previously stated, a court has wide discretion "to grant or refuse a continuance of a proceeding in the orderly administration of justice. This discretion is a judicial one and is subject to review for abuse." Sapp, 62 Haw. at 41.

In this case, on May 15, 2002, a week before the trial was scheduled to begin on May 22, 2002, Marzec moved for a continuance of the bench trial. Marzec sought a continuance until after a July 1, 2002 status conference requested by him. Immediately prior to the commencement of the trial, this motion was denied. During the trial, Marzec again requested a continuance so he could "bring an expert in to – to testify about [black mold], because this is a major part of how it affected . . . my health." The court responded that "since October of

[2001] you've tried to get this case continued, and continued, and continued, and I see that you have been successful in getting it continued several times. But I told you, your request for continuances are denied. We're doing this trial this afternoon, sir."

The district court is correct in that Marzec's first request for a continuance (from November 1, 2001 to November 29, 2001) was granted October 29, 2001, and that Marzec's second request for a continuance was granted on December 27, 2001 (to March 14, 2002).[2] In fact, the trial did not occur until May 22, 2002.

Marzec had ample time to prepare himself for the trial that was held on May 22, 2002. Therefore, when the court denied Marzec's one-week-pretrial and during-the-trial requests for continuances, the court did not clearly exceed the bounds of reason or disregard rules of law to the substantial detriment of Marzec. Coyle, 85 Hawai‘i at 209.

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[2] At the December 27, 2001 hearing, District Judge Barbara Richardson presided and the following was stated, in relevant part:

> MR. MARZEC: Your Honor, I'd like to have a status conference on February 28th because I do need to perform some discovery. I feel that would be enough time. It should be then ready for trial; and then if there's any issues, then we could resolve them or set a trial date.
>
> THE COURT: Well, we don't set status conferences. We can set it for trial, but you --
>
> . . . .
>
> THE COURT: March 14th is fine. March 14th, 2002. And that will be at 9:00, set for trial.

B. Denial of Marzec's Amended Counterclaim

Marzec argues that the court erred when it refused to consider the amended counterclaim Marzec submitted to the court on the day of the trial.

An amended counterclaim is a party's pleading. District Court Rules of Civil Procedure (DCRCP) Rule 8(a) (2003). DCRCP Rule 15(a) (2003) specifies that a party may amend the party's pleading once as a matter of course any time prior to a responsive pleading being served or an oral answer being made. "Otherwise a party may amend its pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." DCRCP Rule 15(a) (2003). It has been said that justice so requires except when there is "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc." Keawe v. Hawaiian Elec. Co., Inc., 65 Haw. 232, 239, 649 P.2d 1149, 1154 (1982).

On November 9, 2001, Marzec filed his original counterclaim alleging that he was owed approximately $5,694.00 in miscellaneous damages. Marzec later filed, pursuant to DCRCP Rule 15(a), a motion for leave to file a supplemental counterclaim. The district court granted this motion on December

27, 2001. Marzec did not submit his proposed amended counterclaim until the day of his trial, May 22, 2002. The district court acted within its discretion when refusing to consider it.

As for Marzec's original counterclaim, the district court did not err in denying it because, as the court correctly stated, "there was no evidence" supporting it.

C. Rent Trust Fund Deposit

On October 29, 2001, the court granted Marzec's Motion for Continuance and continued the case until November 29, 2001, on the condition that Marzec "deposit into the Rent Trust Fund the amount of $1,600 on or before 11/5/01 by 12 noon[.]" Marzec's third point is that the court wrongly forced him to make a deposit of $1,600.00 in the Rent Trust Fund (RTF), pursuant to HRS § 521-78 (1993). We disagree. HRS § 521-78(a) states in relevant part: "At the request of either the tenant or the landlord in any court proceeding in which the payment or nonpayment of rent is in dispute, the court shall order the tenant to deposit any disputed rent as it becomes due into the court[.]"

In the present case, Cooke asked the court to condition Marzec's first motion for continuance "upon [Marzec] paying the rent due for October, 2001, of $2,000 (subject to an additional claim under the lease for double-rent), and the rent due for

November, of $2,000 (subject to an additional claim under the lease for double-rent), into a rent trust fund with the Court[.]" The $2,000.00 amount reflected a $200.00 monthly rental increase that Cooke made effective June 1, 2001. Marzec admitted to only paying rent in the amount of $1,800.00 between the months of June and November 2001, even though he had notice of the rental increase to $2,000.00 per month effective June 1, 2001. This plainly created an October 29, 2001 dispute over the nonpayment of rent, justifying an order requiring a deposit into the RTF under HRS § 521-78. Thus, the court appropriately conditioned Marzec's motion for continuance on his deposit of $1,600.00[3] into the Rent Trust Fund.

The release of the funds to Cooke was consistent with HRS § 521-78(c), which states in relevant part:

> The court in which the dispute is being heard shall accept and hold in trust any rent deposited under this section and shall make such payments out of money collected as provided herein. The court shall order payment of such money collected or portion thereof to the landlord if the court finds that the rent is due and has not been paid to the landlord and that the tenant did not have any basis to withhold, deduct, or otherwise set off the rent not paid.

In this case, after noting that Cooke did not demand the past due rent owed by Marzec until October 16, 2001, the court noted that,

[3] Upon review of the record, it appears that the figure of $1,600.00 in disputed rent is computed as follows. At the time of the October 29, 2001 hearing, $800.00 was in dispute because Marzec continued to pay $1,800.00 rent for the months of June, July, August and September 2001, even though the rent had increased to $2,000.00 per month. An additional $800.00 was in dispute because Marzec paid only $1000.00 for the month of October 2001.

> starting with October 16, [Marzec] is a holdover tenant [pursuant to HRS § 521-71(e)] at the two thousand-dollar rate - rent. So the rent for the month of October would be a thousand dollars,[4] twice that's being asked for. The rent for November would be four thousand dollars. And the rent up until the 8th of December was a thousand sixty-six dollars[.]

(Footnote added.) As a result, the court correctly released the RTF to Cooke because 1) there was no evidence to justify Marzec withholding or deducting any rents, and 2) it was clear to the court that approximately four thousand four hundred and sixty-six dollars ($4,466.00)[5] in past due rent was still owed.

D. Disputed Findings of Fact

Marzec challenges the following findings of fact (FsOF).

> 4. Marzec subsequently gave written notice that there were repairs that were needed and had not been completed by Cooke, and Cooke responded by asking Marzec how the repairs could be done safely while Marzec's dog was loose on the premises. Marzec responded by informing Cooke that he would take care of the repairs and was going to withhold rent. Cooke did the repairs within a short time thereafter. Marzec then made four payments of rent in the amount of $1,800.00 per month. On August 26, 2001, Cooke then informed Marzec that his month to month tenancy was going to be terminated. Marzec then agreed to pay the rent at the rate of $2,000.00 per month, and Cooke agreed to allow Marzec to stay until October 15, 2001. Marzec did not vacate the premises on October 15, 2001, and on October 16, 2001, Cooke filed their [sic] complaint for summary possession. Cooke did not obtain possession of the property until December 8, 2001.

Marzec states that the "wording and sequence [of FOF

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[4] If Marzec was a holdover tenant at the two thousand dollar ($2,000.00) rental rate for the time period between October 16 - 31, it appears that under HRS § 521-71(e) he owed twice the amount for half of the month or two thousand dollars ($2,000.00), not the one thousand dollars ($1,000) required by the court.

[5] This amount is computed by adding the past due rents of October ($1,000.00), November ($4,000.00) and December ($1,066.00), and crediting Marzec with his one thousand six hundred dollars ($1,600.00) security deposit.

no.4] . . . is inadequate and erroneous by implying Cooke was a responsible and responsive landlord and competently performed all repairs." Marzec also states that this FOF is erroneous because "a rent of $2,000 was never agreed upon, and implies Cooke agreed to something different from his original tenancy termination date."

This point has no merit. This finding is supported by substantial evidence in the record. For example, there are numerous instances in the record documenting Cooke's responses to Marzec's requests for repairs. In addition, there is clear evidence supporting the finding that Marzec agreed to start paying rent in the amount of $2,000.00.

> 5. Marzec testified that he had notified the building department about deficiencies in the property, however no citations were issued and there was no contact initiated with Cooke by the building department regarding any deficiencies.

Marzec asserts that he never contacted the "building department", but rather "complained to the Hawaii State Department of Health and the State of Hawaii Office of Consumer Protection[.]" While this is true of his letter dated May 28, 2001, Marzec later testified that in order to demonstrate a retaliatory eviction pursuant to HRS § 521-74(a)(1), the following was true:

> If the tenant has complained in good faith to the Department of Health, landlord, Building Department, Office of Consumer Protection, or other governmental agency, that's one example of . . . you cannot pursue a retaliatory eviction after such a complaint. I made such a complaint. Mr. Cooke admitted he receive [sic] no correspondence from either of those organizations. So by not receiving correspondence, that does not

> relief [sic] him or give him the ability to then pursue a retaliatory eviction.

Marzec's testimony is ambiguous. If any part of FOF no. 5 is clearly erroneous, the error is both understandable and harmless.

> 7. Marze[c] complained of black mold in the premises, but produced no evidence as to any damages suffered as a result of the black mold problem and the mold problem was subsequently corrected by Cooke, shortly after he was notified in writing of the problem by Marze[c].

This finding of fact is not clearly erroneous. Marzec contends that because he testified that he "used to have those – the yellow stuff out of your eyes when I would be there on a weekend especially, the sinus, and the phlegm, and things like that," that he had presented sufficient evidence tying the black mold problem to his condition. Marzec's broad assertions are not substantial evidence that he suffered any damages as a result of the mold. Undocumented, nonexpert testimony of physical ailments and monetary damages does not suffice. See Haw. R. Evid. 701; Ho v. Leftwich, 88 Hawai‘i 251, 259, 965 P.2d 793, 801 (1998); Condron v. Harl, 46 Haw. 66, 71-72, 374 P.2d 613, 617 (1962); 31A Am. Jur. 2d Expert and Opinion Evidence §§ 190, 192 (2002) (individuals, in diagnosing themselves, cannot present medical conclusions or opinions that require expert testimony). Thus, the record supports the court's finding that Marzec "produced no evidence as to any damages suffered as a result of the black mold problem."

The record contradicts Marzec's contention that the

court's finding that "the mold problem was subsequently corrected by Cooke" is clearly erroneous. Cooke and Marzec provided the court with evidence that Cooke conducted successful remedial measures after receiving written notice. Cooke's remedial measures included washing down the mildew, bleaching the black mold areas, and repairing numerous screens. Marzec testified that the problem was "partially repaired" after he withheld rent and "got estimates for two contractors in order to come in and have them do the job."

E. Disputed Conclusions of Law

We will now discuss Marzec's challenge to various following conclusions of law (CsOL).

> 1. The monthly rent for the premises [] from June of 2001 thru the end of the tenancy was $2000.00.

Marzec states that COL no. 1 is wrong because "the incorrect legal standard was applied, in that the rent increase was prohibited by [HRS §] 521-74 and even if allowed, was waived by Cooke and no new rent increase was noticed[.]" We disagree.

The relevant part of HRS 521-74 (1993) states:

> **Retaliatory evictions and rent increases prohibited.** (a) Notwithstanding that the tenant has no written rental agreement or that it has expired, so long as the tenant continues to tender the usual rent to the landlord or proceeds to tender receipts for rent lawfully withheld, no action or proceeding to recover possession of the dwelling unit may be maintained against the tenant, nor shall the landlord otherwise cause the tenant to quit the dwelling unit involuntarily, nor demand an increase in rent from the tenant; nor decrease the services to which the tenant has been entitled, after:
>
> (1) The tenant has complained in good faith to the department of health, landlord, building department, office of consumer protection, or any other governmental agency concerned with landlord-tenant disputes of conditions in or affecting the

> tenant's dwelling unit which constitutes a violation of a health law or regulation or of any provision of this chapter; or
>
> (2) The department of health or other governmental agency has filed a notice or complaint of a violation of a health law or regulation or any provision of this chapter; or
>
> (3) The tenant has in good faith requested repairs under [HRS] section 521-63 or 521-64.

The rental increase involved in this case does not fall within any of the scenarios enumerated in § 521-74(a). First, Marzec states in his letter of May 28, 2001 that he had "registered formal written complaints with the Hawaii State Department of Health and the State of Hawaii Office of Consumer Protection concerning [the] ongoing black mold problem." Marzec's assertion does not satisfy HRS 521-74 for two reasons: 1) there is no written documentation confirming that any complaints were ever filed with either state agency, and 2) since there is no written verification of the complaints, we are left with Marzec's May 28, 2001 letter saying he made the complaints. The date of that letter was over a month after Cooke raised Marzec's rent for the final time on April 12, 2001.

Marzec's only hope in showing that the rental increase was prohibited is by satisfying the requirements of HRS § 521-74(a)(3). To do so Marzec had to demonstrate that he, in good faith, requested repairs under HRS §§ 521-63 and 521-64. In pertinent part, HRS § 521-63 (1993) states that:

> (a) If any condition within the premises deprives the tenant of a substantial part of the benefit and enjoyment of the tenant's bargain under the rental agreement, the tenant may

> notify the landlord in writing of the situation[.]

The relevant portion of HRS § 521-64 (Supp. 2003) states:

> **Tenant's remedy of repair and deduction for minor defects.** (a) The landlord, upon written notification by the department of health or other state or county agencies that there exists a condition on the premises which constitutes a health or safety violation, shall commence repairs of the condition within five business days of the notification with a good faith requirement that the repairs be completed as soon as possible . . . .
>
> . . . .
>
> (c) The landlord, upon written notification by the tenant of any defective condition on the premises which in material noncompliance with [HRS] section 521-42(a) or with the rental agreement, shall commence repairs of the condition within twelve business days of the notification with a good faith requirement that the repairs be completed as soon as possible . . . .

There is no indication in the record that Cooke ever received or Marzec ever dispatched any written request for repairs, as instructed by HRS §§ 521-63 and 521-64, prior to Marzec's rent being raised in April of 2001. Marzec's only written request for repairs appears in his May 28, 2001 letter. Therefore, he does not satisfy the requirements of HRS § 521-74(a)(3).

The relevant statute that applies to rental increases for month-to-month tenants, HRS § 521-21(d) (1993), states that when a tenancy "is from month to month, the amount of rent for such tenancy shall not be increased by the landlord without written notice given forty-five consecutive days prior to the effective date of the increase." That is exactly what happened in the case at hand. In Marzec's May 28, 2001 letter to Cooke, he acknowledges receipt of Cooke's April 12, 2001 letter, "in

which you raised the rent another $200 effective June 1, 2001[.]" This notice, which brought Marzec's rental payment to $2,000 per month, was more than the forty-five day written notice required by HRS § 521-21(d). Thus, there is no evidence in the record of a violation of HRS § 521-74 in making this increase.

> 2. During the months of June, July, August, and September, Marze[c] paid rent at the rate of $1800.00, however since no demand was made for any rental arrearage prior to June of 2001, Cooke waived the claim for the $200.00 per month for those months.

This COL no. 2 that Cooke waived his claim for the $200.00 in the months of June, July, August, and September of 2001 is not wrong. HRS § 521-71(e) (1993). In fact, Marzec even acknowledges that the court "correctly determined that Cooke waived his claim." Marzec's only grievance is with the court's use of the word "prior" instead of the word "after". This minor erratum does not impact the ultimate conclusion, and is therefore harmless.

> 4. Since Marze[c] did not pay any rent after October 15, 2001, as a holdover tenant, Marze[c] is in arrears in the following amounts as a holdover tenant (double rent rate of $2000.00 per month):
>
> | | | |
> |---|---|---|
> | October | 16 - 31 | $1000.00 |
> | November | 1 - 30 | 4000.00 |
> | December | 1 - 8 | 1066.00 |
> | Balance | | $6066.00 |
> | Less Security Deposit | | ($1600.00) |
> | Balance due | | $4466.00 |
>
> Marze[c] has deposited an additional $1600.00 in the rent trust fund and he shall be given credit for that amount against the balance due which leaves a final balance of $2866.00. [Cooke] is entitled to attorney's fees incurred up to twenty five per cent of the final balance which amounts to $716.50, plus court costs.

Marzec alleges that this entire COL no. 4 is wrong.

After carefully reviewing the record and the briefs submitted, and giving due consideration to the arguments and issues raised by both Marzec and Cooke, we disagree. The facts of this case support COL no. 4.

> 5. Marze[c] failed to present evidence sufficient to support any finding of retaliatory eviction or that he had suffered damages in any amounts and therefore the counterclaim is dismissed with prejudice.

After carefully reviewing the record and the briefs submitted, and giving due consideration to the arguments and issues raised by both Marzec and Cooke, we conclude that the facts of this case support COL no. 5.

F. Denial of Motion to Disqualify

Marzec's next argument is that the court erred when it denied Marzec's Motion to Disqualify Judge David Fong. In support of his motion, Marzec filed an affidavit and, as stated by Marzec in his opening brief, "used a professional newspaper reporter's quotations, attributed to Judge Fong, and other factual information to demonstrate that a judge exhibiting the described behavior must have a pro-landlord personal prejudice and bias which prioritized receiving lucrative rents[.]"

The procedures for seeking judicial disqualification due to personal bias are spelled out in HRS § 601-7(b) (1993). It requires that

> [w]henever a party to any suit, action, or proceeding, civil or criminal, makes and files an affidavit that the judge before whom the action or proceeding is to be tried or heard has a personal bias or prejudice either against the party or in favor of any opposite party to the suit, the judge shall be disqualified from

> proceeding therein. Every such affidavit shall state the facts and the reasons for the belief that bias or prejudice exists and shall be filed before the trial or hearing of the action or proceeding, or good cause shall be shown for the failure to file it within such time.

The affidavit must show that the trial judge has a personal bias and prejudice against the party, and the judge's impartiality might reasonably be questioned. Code of Judicial Conduct, Canon 3(E)(1)(a) (Revised) (1992); State v. Mata, 71 Haw. 319, 325, 789 P.2d 1122, 1126 (1990); Whittemore v. Farrington, 41 Haw. 52, 60 (1955). Once the affidavit is filed, a "judge whose disqualification is sought must take the facts alleged as true, but can pass upon whether they are legally sufficient." Ross, 89 Hawai‘i at 377, 974 P.2d at 17 (citation omitted). "The reasons and facts for the belief the affiant entertains must give fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment." Id. (internal brackets, ellipsis and citation omitted).

Based on the facts of the case, Judge Fong did not abuse his discretion in denying Marzec's motion. Marzec's motion and affidavit contained copies of newspaper articles that related to Judge Fong's prior real estate holdings in Honolulu. The crux of Marzec's argument was that because Judge Fong had previously acted as a landlord for some of the real property he once owned, he was pro-landlord, thus prejudicing Marzec's case from the beginning. However, neither the motion nor the affidavit nor the newspaper articles presented any evidence that Judge Fong had a

personal bias in favor of all landlords or landlords like Cooke, or a prejudice against all tenants or tenants like Marzec, or that Judge Fong's impartiality might reasonably be questioned.

Moreover, Marzec's motion was rightfully denied because it was untimely. As this court stated in Yorita, the motion to disqualify and affidavit must be filed "before the hearing or the action or proceeding and, if not, that good cause shall be shown." 3 Haw. App. at 152. Here, Marzec filed his motion and affidavit June 17, 2002, almost a month after his May 22, 2002 trial and nearly two weeks after the court entered it initial judgment on June 5, 2002. In addition, as delineated above, Marzec did not show good cause why his motion should be considered. He cannot say he reasonably did not know until after the trial because the newspaper articles and letters to the editor were published in 2000.

G. Denial of Post-Trial Discovery and Imposition of Sanctions

Lastly, Marzec argues that the trial court abused its discretion when it denied his post-trial discovery request and levied sanctions against him. Marzec filed a motion for discovery on August 14, 2002, before but on the same day he filed his notice of appeal of the August 9, 2002 Amended Judgment.

"As a general rule, the filing of a notice of appeal removes the case to the jurisdiction of the appellate court and deprives the lower court of jurisdiction to proceed further in

the case, except for some matters." Kamaole Two Hui v. Aziz Enters., Inc., 9 Haw. App. 566, 571, 854 P.2d 232, 235 (1993) (citing MDG Supply, Inc. v. Diversified Inv., Inc., 51 Haw. 375, 463 P.2d 525 (1969)). Marzec's motion for discovery was not such an exceptional matter.

Hawai‘i Rules of Appellate Procedure Rule 4(a) (2004) states, in relevant part, as follows:

> (3) 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[.]

Marzec's August 14, 2002 Motion for Discovery, filed pursuant to DCRCP Rules 30, 31 and 37, was not "a motion that seeks to reconsider, vacate or alter the judgment, or seeks attorney's fees or costs". Consequently, the district court no longer had jurisdiction to rule on Marzec's Motion for Discovery or to impose sanctions against him.

CONCLUSION

Accordingly, we affirm the August 9, 2002 Amended Judgment entered in favor of Plaintiff-Appellee William J. Cooke and against Defendant-Appellant Thomas Marzec in the amount of $3,739.50. Marzec having filed his notice of appeal on August 14, 2002, we conclude that the district court lacked jurisdiction to enter its September 17, 2002 Second Amended Judgment, awarding Cooke $4,039.50 by adding $300.00 in

sanctions, and we declare that the award of $4,039.50 in the September 17, 2002 Second Amended Judgment is void.

DATED: Honolulu, Hawai‘i, April 27, 2004.

On the briefs:

Thomas Adam Marzec,
pro se Defendant-Appellant.

Chief Judge

William J. Cooke,
pro se Plaintiff-Appellee.

Associate Judge

Associate Judge