NO. 25609

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

MOORE & MOORE, a California Trust, under Trust Agreement of January 7, 1997, Plaintiff/Counterclaim Defendant-Appellant, v. KEPUHI POINT REEF, LLC, a Hawaii Limited Liability Company; JOSEPH A. BRESCIA, individually and in his capacity as the Member Manager of Kepuhi Point Reef, LLC; STEVEN MOODY; JOHN DOES 1-10; JANE DOES 1-10; DOE PARTNERSHIPS 1-10; DOE CORPORATIONS 1-10; DOE "NON-PROFIT" CORPORATIONS 1-10; and DOE ENTITIES 1-10, Defendants/Counterclaim Plaintiffs-Appellees.

APPEAL FROM THE CIRCUIT COURT OF THE FIFTH CIRCUIT
(CIV. NO. 02-1-0137)

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

In this dispute over a failed sale of real property, the erstwhile buyer, Plaintiff/Counterclaim Defendant-Appellant Moore & Moore (M&M), appeals the February 6, 2003 order of the circuit court of the fifth circuit, the Honorable George M. Masuoka, judge presiding, that granted in part and denied in part the motion for partial summary judgment (the MPSJ) filed on December 16, 2002 by Defendants/Counterclaim Plaintiffs-Appellees Kepuhi Point Reef, LLC (Kepuhi), Joseph A. Brescia (Brescia), and Steven Moody (collectively, Defendants). M&M also appeals the writ of possession the circuit court issued pursuant to and contemporaneously with its order.

Upon an assiduous review of the record and the briefs submitted by the parties, and giving careful consideration to the arguments advanced and the issues raised by the parties, we resolve M&M's points of error on appeal as follows:

1. M&M first contends the circuit court erred in partially granting the MPSJ, because there was no showing below that Kepuhi, the owner of the real property in question, "exists as a legal entity in Hawai'i[.]" Amended Opening Brief at 13. This issue was not raised by M&M below and will not be considered on appeal. Kawamata Farms, Inc. v. United Agri Products, 86 Hawai'i 214, 248, 948 P.2d 1055, 1089 (1997).

2. M&M next argues that the circuit court erred in granting summary judgment against M&M's claim for specific performance, because the underlying February 1, 2002 Joint Ownership Preliminary Commitment (the JOPC) was an enforceable agreement of sale of the subject real property. We disagree.

a. On its face, the JOPC was preliminary in nature and egregiously lacking in essential elements or terms, and hence, unenforceable. Malani v. Clapp, 56 Haw. 507, 510, 542 P.2d 1265, 1267 (1975); Mednick v. Davey, 87 Hawai'i 450, 458-59, 959 P.2d 439, 447-48 (App. 1998).

b. Citing In re O.W. Ltd. P'ship, 4 Haw. App. 487, 491-92, 668 P.2d 56, 60-61 (1983), and Hawaii Leasing v. Klein, 4 Haw. App. 1, 8, 658 P.2d 343, 348 (1983), M&M argues that, because the parol evidence rule does not apply to the

unintegrated JOPC, "the JOPC may be supplemented by parol evidence consistent with the provisions of the JOPC." Amended Opening Brief at 18. However, the cases cited are inapposite, because they dealt with the interpretation of contracts that were indisputably enforceable in the first place. See O.W. Ltd. P'ship, 4 Haw. App. at 488-89, 668 P.2d at 59; Hawaii Leasing, 4 Haw. App. at 2-5, 658 P.2d at 345-46. That M&M sought below to "supplement" the laconic, one-page JOPC with a twenty-nine page affidavit and almost three hundred pages of exhibits, is a concrete measure of the incongruity of this argument.

c. M&M also asserts that the operative document in this case, the Deposit Receipt Offer and Acceptance, reference date April 15, 2002 (the DROA), somehow "'related back' to the JOPC" and thus rendered the JOPC enforceable, Amended Opening Brief at 24, because Brescia "conducted himself in a manner as if the JOPC was a binding and enforceable contract." Amended Opening Brief at 23. This assertion is untenable. First, the DROA provided that, "This DROA constitutes the entire agreement between Buyer and Seller and supersedes and cancels any and all prior negotiations, representations, warranties, understandings or agreements (both written and oral) of Buyer and Seller." Second, relation back *vel non*, the JOPC was unenforceable in any event. Finally, we question M&M's current characterization of Brescia's post-JOPC conduct, where below M&M alleged fraud

because Brescia acted as if the JOPC was not binding and enforceable. Cf. Roxas v. Marcos, 89 Hawaiʻi 91, 124, 969 P.2d 1209, 1242 (1998) (the doctrine of judicial estoppel "prevents parties from playing 'fast and loose' with the court or blowing 'hot and cold' during the course of litigation" (citations and some internal quotation marks omitted)).

3. For its next point of error on appeal, M&M seizes upon a statement in the MPSJ, in which the Defendants, referring to the JOPC, asserted that "the transaction was terminated." M&M thereupon avers: "Quite obviously, in order to terminate the 'transaction,' there had to be an agreement to transact." Amended Opening Brief at 24. This is mere casuistry.

4. Citing Jenkins v. Wise, 58 Haw. 592, 574 P.2d 1337 (1978), M&M contends the circuit court erred in ordering ejectment pursuant to the counterclaim, because M&M had equitable title to the property. We disagree. While it is true the Jenkins court recognized equitable title resident in the purchaser under an agreement of sale, id. at 596, 574 P.2d at 1340-41, its holding was predicated upon the existence of a valid and enforceable agreement of sale. Id. at 593-95, 574 P.2d at 1339-41. Here, as we have said, the JOPC was not an enforceable agreement.

5. M&M also maintains, upon a number of arguments, that the circuit court erred in ordering ejectment, because the Defendants failed to present the quantum of evidence necessary to

show that the rental agreement aligned with the DROA had been cancelled or terminated.

a. First, M&M repeats its argument that Defendants failed to demonstrate Kepuhi is a legal entity in Hawaiʻi. We reiterate our rejection of this argument, supra.

b. Next, M&M asserts that, in order to demonstrate the predicate cancellation or termination of the DROA, Defendants had to prove the following: "the closing date was extended, the DROA did not close by September 30, 2002, and the failure to close by September 30 is not due to 'Seller breach' of the DROA." Amended Opening Brief at 27 (citation to the record omitted). M&M avers, accordingly, that the June 13, 2002 cancellation letter sent by counsel for the Defendants was a seller breach of the DROA. These averments lack merit. M&M's managing agent admitted in response to a request for admissions, see Hawaiʻi Rules of Civil Procedure Rule 36(b) (2002) ("matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission"), that M&M "failed to deposit the sum of $250,000.00 with escrow on or before June 12, 2002." M&M's failure to fund the $250,000.00 deposit by May 10, 2002 was, in and of itself, a material breach of the DROA justifying cancellation by the Defendants.

c. Third, M&M contends the rental agreement was not cancelled, because the agreement provided that, "Rental

Agreement cancels upon close of escrow and/or cancellation of sales agreement with Moore & Moore and/or assignee of DROA dated 15 Apr 2002." Based on this proviso, M&M argues that escrow has not closed and the DROA has not been cancelled, because the Defendants failed to comply with the entirety of ¶ C-21 of the DROA. M&M also notes that, "the escrow instructions provide that the escrow company may, upon certain conditions, accept the demand for cancellation or elect to wait for joint instruction or file an interpleader." Amended Opening Brief at 28 (citations to the record omitted). These arguments are unavailing. Because the rental agreement proviso was stated alternatively in the disjunctive, cancellation of the rental agreement required only cancellation of the DROA. The DROA, in turn, provided that, "Any termination shall be in writing and delivered to Escrow to be effective." The June 13, 2002 cancellation letter from counsel for the Defendants to M&M and escrow was delivered to escrow. Thereupon, the DROA was cancelled, and along with it the rental agreement and M&M's right to possession thereunder. The other provisions of ¶ C-21 do not state conditions precedent to cancellation, but rather, arrangements for the subsequent winding down of escrow and disposition of any remaining cash deposits. Similarly, the referenced escrow instructions could not affect a cancellation already effective upon delivery to escrow, and were in any event discretionary and not mandatory.

d. Next, M&M contends, "there is no evidence in the record from the escrow company that it has accepted cancellation of the DROA." Amended Opening Brief at 28. This is immaterial. As noted above, cancellation of the DROA was effective upon delivery, not upon acceptance. M&M also argues, without citing any authority, that, "[Brescia] attests in his affidavit that he signed the cancellation documents. But those statements are conclusory, inadmissible and without documentary support." Id. On the contrary, it is M&M's argument that is conclusory, ineffective and without cognizable support. M&M complains, again without authority, that the Defendants never notified M&M or escrow that Defendants' legal counsel, identified as such in his June 13, 2002 cancellation letter, was the "authorized agent for the seller in the DROA transaction." Id. This complaint is facially defective and merits no discussion.

e. Fifth, M&M avers that "the June 5, 2002 letter from [M&M] to escrow clearly constitutes an objection requiring escrow to either wait for joint instructions or file an interpleader. Thus, escrow could not have acted to cancel since the record does not contain any joint instructions following the June 13th letter." Amended Opening Brief at 29. Again, however, the relevant escrow instructions were discretionary and not mandatory.

f. Next, M&M argues that the Defendants breached the DROA (1) by failing to provide the security that M&M

requested for its cash deposits when M&M was called upon to cooperate in the Defendants' 1031 exchange, and (2) by failing to mediate as provided in the DROA. However, (1) the DROA required M&M to cooperate in the Defendants' 1031 exchange and did not require the Defendants to provide security therein for M&M's cash deposits, and (2) any breach of the mediation provision was inconsequential.

g. Seventh, M&M asserts that, "Defendants have failed to make the requisite showing that [M&M] breached the DROA as Defendants have claimed." Amended Opening Brief at 29. We disagree. As detailed above, M&M conclusively admitted its material breach of the DROA.

h. Finally, M&M complains of a variance between the circuit court's findings and various aspects of the record. This variance is, however, immaterial.

6. M&M complains that the circuit court erred in expunging M&M's *lis pendens*, because a *lis pendens* may remain on record while an appeal is pending. Even assuming, *arguendo*, that this is the law, our disposition of the appeal renders this point of error moot.

7. For its last point of error on appeal, M&M contends the circuit court erred in ruling that Defendants "may file a Motion to request sanctions as referenced in [the MPSJ]." Inasmuch as no such motion appears in the record, this point of error is also moot.

Therefore,

IT IS HEREBY ORDERED that the February 6, 2003 order of the circuit court and the writ of possession of even date are affirmed.

DATED: Honolulu, Hawaiʻi, September 10, 2004.

On the briefs:

Theodore Y. H. Chinn (Law Offices of Theodore Chinn) and Mark R. Zenger (Richards & Zenger), for plaintiff/counterclaim defendant-appellant.

Chief Judge

Associate Judge

Donald H. Wilson and Pamela P. Rask (Belles Graham Proudfoot & Wilson), for defendants/counterclaim plaintiffs-appellees.

Associate Judge