

DISSENTING OPINION BY WATANABE, PRESIDING JUDGE

I respectfully dissent. I believe that the Circuit Court of the First Circuit (the circuit court) erred in granting the amended summary judgment in favor of Plaintiffs/Counterclaim Defendants-Appellees Clarence T. Izuo, Cecelia M. Izuo, Gary Y. Nishioku, and Renee Nishioku (Appellees) on their complaint against Defendant/Counterclaimant-Appellant Joseph Dias, Jr. (Dias) for breach of an agreement of sale for residential property. I also believe that the circuit court abused its discretion in certifying the amended summary judgment as final for appeal purposes.

Under the agreement of sale, Dias purchased from Appellees residential real property located in Kailua, Hawai'i for \$360,000, payable over a three-year period. Dias made three initial installment payments but thereafter refused to make further payments, claiming that he had incurred over \$100,000 in expenses to repair previously undisclosed defects in the structure of the residence.

In response to Appellees' complaint, which sought to cancel the agreement of sale and regain possession of the property, Dias raised the following affirmative defenses: "nondisclosure, concealment, breach of contract, offset, setoff, fraud, deceit, laches, misrepresentation, illegality, failure of consideration, violation of the mandatory provisions of

Chapter 508D of the Hawaii Revised Statutes [(HRS)¹] negligence, and undue influence." (Footnote added.) Dias also filed a counterclaim against Appellees, seeking actual and punitive damages for: violation of the mandatory seller disclosure requirements in real estate transactions imposed by HRS chapter 508D, breach of contract, breach of good faith and dealing, fraud and deceit, intentional misrepresentation, negligent misrepresentation, intentional emotional distress, negligent emotional distress, breach of fiduciary duty, and unfair and deceptive business practices. Thus, there was substantial overlap between Dias's affirmative defenses to Appellees' complaint and Dias's counterclaim allegations.

In granting Appellees amended summary judgment on their complaint, the circuit court, relying on HRS § 508D-6 (Supp. 2005),² concluded that since it was undisputed that Dias had

¹ Hawaii Revised Statutes (HRS) chapter 508D requires sellers of residential real property to disclose to buyers all material facts relating to the property being offered for sale. "Material fact" is defined, in relevant part, as "any fact, defect, or condition, past or present, that would be expected to measurably affect the value to a reasonable person of the residential real property being offered for sale." HRS § 508D-1 (Supp. 2005).

² HRS §508D-6 (Supp. 2005) states:

Later discovered inaccurate information. Prior to closing the real estate purchase contract, a buyer who receives a disclosure statement that fails to disclose a material fact or contains an inaccurate assertion that directly, substantially, and adversely affects the value of the residential real property, and who was not aware of the foregoing failure or inaccuracy, may elect in writing to rescind the real estate purchase contract within fifteen calendar days of the earlier to occur of:

- (1) The discovery of the failure or inaccuracy; or
- (2) The receipt of an amended disclosure statement correcting the failure or inaccuracy, in the

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defaulted on his payments under the agreement of sale and the agreement had been recorded, "the only remedy that [Dias had] against [Appellees] under [HRS § 508D-6 was] recovery of actual damages that were due to [Appellees'] negligence in failing to provide the appropriate disclosures" for real estate transactions required by HRS chapter 508D. See also HRS §§ 508D-16 (Supp. 2005)³ and 508D-16.5 (Supp. 2005).⁴ The circuit court then

²(...continued)

manner provided by section 508D-5(b) or (c).

The buyer's right to rescind the real estate purchase contract under this section shall not apply if the sale of the residential real property has been recorded; provided that the buyer may pursue all additional remedies provided by law.

³ HRS § 508D-16 (Supp. 2005) provides now, as it did during the proceedings below, as follows:

Remedies; voidable contracts. (a) A buyer may elect to complete the purchase of residential real property even if the seller fails to comply with the requirements of this chapter. After recordation of the sale of residential real property, a buyer shall have no right under this chapter to rescind the real estate purchase contract despite the seller's failure to comply with the requirements of this chapter.

(b) When the buyer is provided a disclosure statement prepared and delivered in accordance with this chapter and the buyer decides to rescind the real estate purchase contract, the buyer shall not be entitled to any damages but shall be entitled to the immediate return of all deposits.

(c) In addition to the rights of rescission granted to the buyer under this chapter, when the seller negligently fails to provide the disclosure statement required by this chapter, the seller shall be liable to the buyer for the amount of the actual damages, if any, suffered as a result of the seller's negligence.

(d) In addition to the remedies allowed under subsection (b) or (c), a court may also award the prevailing party attorney's fees, court costs, and administrative fees.

⁴ HRS § 580-16.5 (Supp. 2005) provides now, as it did during the proceedings below, as follows:

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stated that Appellees' claim for cancellation of the agreement of sale and Dias's counterclaim for damages were independent of each other and since Appellees had established the elements of their claim, they were entitled to summary judgment as to their claim. The circuit court appears, however, to have ignored Dias's affirmative defenses in granting the amended summary judgment.

In a case very similar to the instant case, this court held that where fraudulent inducement was raised as an affirmative defense to a mortgage foreclosure action against guarantors of a defaulted loan, disputed evidence as to whether the defendants had been fraudulently induced to enter into the loan transaction was a matter for jury determination, thereby precluding summary judgment. Touche Ross Ltd. v. Filipek, 7 Haw. App. 473, 480-81, 778 P.2d. 721, 726-27 (1989).

In this case, I believe that genuine issues of material fact exist as to Dias's affirmative defenses, including Dias's HRS chapter 508D nondisclosure defense. See Hawaii Community Federal Credit Union v. Keka, 94 Hawai'i 213, 11 P.3d 1 (2000). In line with Touche Ross, I would vacate the amended summary judgment and remand for an evidentiary hearing on the factual issues presented.

I also believe that the circuit court should not have certified the amended summary judgment as final for appeal

⁴(...continued)

Rescission. Notwithstanding anything to the contrary in this chapter, any action for rescission brought under this chapter shall commence prior to the recorded sale of the real property.

purposes pursuant to Hawai'i Rules of Civil Procedure (HRCP) Rule 54(b). Because the facts and legal issues underlying Appellees' adjudicated claim and Dias's unadjudicated counterclaim were significantly intertwined, the circuit court's HRCP Rule 54(b) certification raised a substantial risk of duplicative appellate review. See 10 Moore's Federal Practice § 54.23[1][a] at 54-66 to 54-67. Additionally, by canceling the agreement of sale and returning the real property to Appellees, the circuit court effectively precluded Dias from claiming an offset against any damages that he may be able to prove on his counterclaim. Therefore, even if the circuit court may have had the discretion to enter judgment under HRAP Rule 54(b), I believe, given the facts of this case, that the court should not have entered the HRCP Rule 54(b) judgment. I would therefore dismiss this appeal for lack of appellate jurisdiction.

Corinne K.A. Watanelie
Presiding Judge

