

NO. 27015

IN THE INTERMEDIATE COURT OF APPEALS  
OF THE STATE OF HAWAII

AQUARIAN FOUNDATION, a Washington non-profit  
corporation, Plaintiff/Appellant/Cross-Appellee

v.

ASSOCIATION OF APARTMENT OWNERS OF THE WAIKIKI PARK  
HEIGHTS, an association of apartment owners,  
Defendant/Appellee/Cross-Appellant,  
and  
UNIPACK LIMITED, a Japan Corporation, JOHN DOES,  
JANE DOES, DOE PARTNERSHIPS, DOE CORPORATIONS,  
TRUSTEES OR OTHER ENTITIES, Defendants

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT  
(CIVIL NO. 93-4924)

SUMMARY DISPOSITION ORDER

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

Plaintiff-Appellant/Cross-Appellee Aquarian Foundation  
(Aquarian), a Washington non-profit corporation, appeals from the  
Judgment filed on November 24, 2004 in the Circuit Court of the  
First Circuit (circuit court).<sup>1/</sup> As points of error, Aquarian  
contends the circuit court erred in entering: (1) on  
September 3, 2003, the "Order Granting Defendant AOA  
[Association of Apartment Owners of] Waikiki Park Heights' Motion  
to Dismiss for Failure to Prosecute Filed July 21, 2003" (Motion  
to Dismiss); (2) on March 12, 2004, the "Order Granting in Part  
and Denying in Part AOA of Waikiki Park Heights' Request for  
Attorney's Fees, Costs and Expenses Filed April 27, 1998, and  
Order Denying Plaintiff Aquarian Foundation's Motion for Fees,

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<sup>1/</sup> The Honorable Richard W. Pollack presided.

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CLERK, APPELLATE COURTS  
STATE OF HAWAII

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Costs and Expenses, Filed September 23, 2003"; (3) on July 27, 2004, the "Order Granting Defendant AOA Waikiki Park Heights' Request for Rule 54(d) Costs"; and (4) on July 30, 2004, the "Order Awarding Attorney's Fee and Costs."

In its cross-appeal, Defendant-Appellee/Cross-Appellant Association of Apartment Owners of Waikiki Park Heights (AOAO) contends the circuit court erred in entering: (1) the Judgment; (2) the March 12, 2004 "Order Granting in Part and Denying in Part AOA of Waikiki Park Heights' Request for Attorney's Fees, Costs and Expenses Filed April 27, 1998, and Order Denying Plaintiff Aquarian Foundation's Motion for Fees, Costs and Expenses, Filed September 23, 2003"; (3) the July 27, 2004 "Order Denying Defendant AOA Waikiki Park Heights' Motion for Clarification, Reconsideration or Amendment of Order Filed March 23, 2004"; and (4) the July 30, 2004 "Order Awarding Attorney's Fees and Costs."

On appeal, Aquarian argues the circuit court erred in (1) granting the Motion to Dismiss; (2) awarding fees and costs in favor of AOA; and (3) denying fees and costs to Aquarian. On cross-appeal, AOA argues the circuit court erred in not allowing attorney's fees under Hawaii Revised Statutes (HRS) § 514A-89 (1993) from the 1993 Lease Agreement.

On or about November 18, 1988, AOA entered into a Common Area Use Agreement (1988 Agreement) with Unipack Company, Ltd., (Unipack) whereby certain portions of the Waikiki Park Heights (WPH) condominium lobby area were leased to Unipack for a

term of two years, with options. Union Air Service, Inc.<sup>2/</sup> (Union Air) proceeded to construct walls around the leased premises, which Aquarian alleged physically prevented Aquarian, other AOA members, and the public from using the common lobby areas. AOA and Union Air renewed their agreement on November 1, 1993 (1993 Agreement) for a second term of two years. On October 29, 1995, the 1993 Agreement was amended (Amended 1993 Agreement) to clarify that Union Air was the tenant.

On December 20, 1993, Aquarian filed a Complaint in the circuit court. The Complaint named AOA and Unipack as Defendants. The Complaint charged, among other things, that the 1988 Lease Agreement constituted a violation of HRS § 514A-13 (1993), which constituted conversion, an unlawful cloud on title, and an unlawful deprivation of property rights. On August 3, 1995, Aquarian filed its First Amended Complaint, again naming AOA and Unipack as Defendants. The First Amended Complaint alleged, among other things, that (1) the conduct of AOA and Unipack and the 1988 Lease Agreement constituted conversion in violation of HRS § 514A-13, and (2) the conduct of AOA and Unipack and the 1993 Agreement were in violation of HRS §§ 514A-13 and 514A-89 (1993) by illegally converting a common element into a limited common element.

Upon careful review of the record and the briefs submitted by the parties and having given due consideration to

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<sup>2/</sup> Unipack Company, Ltd. (Unipack) was the named lessee on the lease; however, the actual lessee was Union Air Service, Inc. (Union Air).

the arguments advanced and the issues as raised by the parties, we conclude:

(1) The circuit court did not abuse its discretion in dismissing Aquarian's First Amended Complaint for lack of prosecution. Aquarian failed to put forward any valid and credible explanation or mitigating circumstance to account for its delay of more than two years. Hawaii Rules of Civil Procedure (HRCPP) Rule 41(b) (2005); Compass Dev., Inc. v. Blevins, 10 Haw. App. 388, 397-98, 876 P.2d 1335, 1340 (1994); Ellis v. Harland Bartholomew and Assocs., 1 Haw. App. 420, 426, 620 P.2d 744, 748 (1980); Bagalay v. Lahaina Restoration Found., 60 Haw. 125, 138, 588 P.2d 416, 425 (1978).

(2) The circuit court did not abuse its discretion in awarding attorney's fees, costs, and expenses to AOA and denying such award as to Aquarian. There was no substantive determination or final disposition substantiating any of Aquarian's claims. Therefore, by the plain language of HRS § 514A-94(b) (1993), AOA is entitled to an award of attorney's fees, costs and expenses, and Aquarian is not. TSA Int'l Ltd. v. Shimizu Corp., 92 Hawai'i 243, 253, 990 P.2d 713, 723 (1999); Chun v. Bd. of Trustees of the Employees' Ret. Sys. of the State of Hawai'i, 106 Hawai'i 416, 431, 106 P.3d 339, 354, reconsideration denied, 106 Hawai'i 477, 106 P.3d 1120 (2005); Schmidt v. Bd. of Dirs. of Assoc. of Apt. Owners of Marco Polo Apts., 73 Haw. 526, 531-32, 836 P.2d 479, 482 (1992).

(3) The circuit court did not abuse its discretion in allowing AOA partial recovery for attorney's fees. Once the Collateral Settlement Agreement was entered, Aquarian's claims under HRS § 514A were moot. After that point, AOA could no longer avail itself of a claim for attorney's fees under HRS § 514A-94(b). HRS § 514A-94(b); Schmidt, 73 Haw. at 531-32, 836 P.2d at 482.

Therefore,

The Judgment filed on November 24, 2004 in the Circuit Court of the First Circuit is affirmed.

DATED: Honolulu, Hawai'i, August 23, 2006.

On the briefs:

Jean Schiedler-Brown  
(Law Offices of Jean Schiedler-  
Brown & Assoc., P.S.)  
for Plaintiff/Appellant/  
Cross-Appellee.

Madalyn Purcell and  
David Y. Suzuki  
(Burke McPheeters Bordner & Estes)  
for Defendant/Appellee/  
Cross-Appellant

  
Chief Judge

  
Associate Judge

  
Associate Judge