NO. 27430

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

TOK CHA KIM and TOK CHA INVESTMENTS, INC., Plaintiffs-Appellants, v. PACIFIC GUARDIAN CENTER, MEIJISEIMEI REALTY (USA) INC., and BISHOP STREET ASSOCIATES LLC, Defendants-Appellees

and

PACIFIC GUARDIAN CENTER, Counterclaimant-Appellee, v. TOK CHA KIM and TOK CHA INVESTMENTS, INC., Counterclaim Defendants-Appellants, and JOHN KIM, JOHN DOES 1-10, JANE DOES 1-10, DOE PARTNERSHIPS 1-10, DOE CORPORATIONS 1-10, and MISCELLANEOUS DOE ENTITIES 1-10, Counterclaim Defendants

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(Civ. No. 04-1-0052)

MEMORANDUM OPINION
(By: Watanabe, Presiding J., Lim, and Foley, JJ.)

Plaintiffs-Appellants Tok Cha Kim (Kim or Tenant) and Tok Cha Investments, Inc. (TCI) (collectively, Appellants) appeal from the following orders and judgment that were entered by the Circuit Court of the First Circuit (the circuit court)[1] in favor of Defendants-Appellees Pacific Guardian Center (PGC), Meiji Yasuda Realty USA Incorporated, formerly known as Meijiseimei Realty (USA) Inc. (MRI), and Bishop Street Associates LLC (BSA) (PGC, MRI, and BSA collectively, Appellees):

(1) Final judgment, filed on August 24, 2005;

[1] The Honorable Victoria S. Marks entered the orders and judgment which are challenged in this appeal.

(2) Order, filed on July 13, 2005, denying Appellants' May 12, 2005 motion for reconsideration of the (a) order granting PGC's motion for summary judgment on all claims in PGC's first amended counterclaim against TCI, filed on April 8, 2004; (b) order granting PGC's motion for summary judgment on all claims in PGC's first amended counterclaim against Kim, filed on April 8, 2004; (c) order granting PGC's motion for summary judgment on all claims in the amended complaint, filed on January 22, 2004; and (d) order granting MRI and BSA's motion for summary judgment on all claims in the amended complaint, filed on January 22, 2004;

(3) Order, filed on May 2, 2005, granting PGC's motion for summary judgment on all claims in PGC's first amended counterclaim against TCI, filed on April 8, 2004;

(4) Order, filed on May 2, 2005, granting PGC's motion for summary judgment on all claims in PGC's first amended counterclaim against Kim, filed on April 8, 2004;

(5) Order, filed on May 2, 2005, granting PGC's motion for summary judgment on all claims in the amended complaint, filed on January 22, 2004; and

(6) Order, filed on May 2, 2005, granting MRI and BSA's July 19, 2004 motion for summary judgment on all claims in the amended complaint, filed on January 22, 2004.

We affirm.

DISCUSSION

A.

The genesis for this appeal is a commercial lease, dated December 22, 1998 (the Lease), between Kim, doing business as Bishop Convenience, and Grosvenor Center Associates, a Hawai'i joint venture (Grosvenor or Landlord). Pursuant to the Lease, Kim agreed to rent, for a period of five years and one-half month, 1,785 square feet of net rentable floor area on the ground floor of the Grosvenor Center in Honolulu, Hawai'i, for the operation of a sundry, fine wine, and convenience store.

Paragraph 16 of the Lease, entitled "Surrender of Premises[,]" provided as follows:

> At the expiration or sooner termination of this lease, Tenant will surrender and deliver up to Landlord, possession of the Premises, including all improvements whenever and by whomsoever made or placed therein, in good condition and repair, ordinary use and wear excepted, PROVIDED, HOWEVER, that if there be no default on the part of Tenant at the termination of this lease, Tenant may, or if Landlord shall so require, notice thereof to be given not less than sixty (60) days prior to the end of the term hereof, Tenant shall remove prior to the termination of this lease all signs and trade fixtures erected or placed upon the Premises, and on such notice shall also remove any improvements made or placed by Tenant in the Premises, as specified in such notice by Landlord, and Tenant shall replace and repair all damage to the Premises, caused by or resulting from such removal and leave the Premises in a clean and orderly condition. In the event Tenant shall fail to perform such removal and/or restoration in accordance with requirements hereof, Landlord may do so and Tenant, upon demand, will pay to Landlord the cost thereof, plus interest at the rate of one percent (1%) per month from the date the same be demanded by Landlord until paid. This obligation shall survive the termination of this Lease. Any property left upon the Premises by Tenant at the termination of this lease may, at the option of Landlord (a) be removed and stored by Landlord, at the cost of and for the account of Tenant, or (b) be deemed and declared by Landlord to have been abandoned by Tenant, in which case Landlord may appropriate, destroy or dispose of the same without liability or accountability to Tenant.

On March 8, 1999, Kim and Grosvenor executed a First Amendment to Commercial Lease, pursuant to which the name of the tenant under the Lease was amended to "Tok-Cha Kim, doing business as Plaza Convenience[.]"

By a Consent to Assignment of Lease, dated October 12, 1999 and made effective on December 23, 1999, Grosvenor consented to the assignment of the Lease by Kim to TCI, a corporation for which Kim was the sole shareholder. The document specifically provided, however, that "[n]either the Assignment nor this Consent shall release or discharge [Kim] from any liability under the Lease and [Kim] shall remain liable and responsible for the full performance and observance of all of the provisions, covenants and conditions set forth in the Lease to be performed and observed by the tenant."

By a Personal Guaranty of Lease, dated October 12, 1999, Kim and her then-husband, John Kim (John), personally guaranteed TCI's performance of the Lease. On December 15, 1999, Kim signed a Guaranty Agreement, agreeing to pay all rent and fulfill all obligations required under the Lease as assigned to TCI.

Grosvenor's interest in the Lease was eventually assigned to PGC, a partnership between MRI and BSA.

On May 20, 2003, TCI, through its attorney R. Patrick Jaress (Jaress), approached PGC with a written business plan to downsize the convenience store from 1,785 square feet to about 900 square feet, a size comparable to other convenience stores in

downtown Honolulu. The plan noted that the store has struggled to make a profit since the first year of operation, "largely due [to] lack of gross sales amount needed for this location of this size." Additionally, the "comparative statement of income for the store's last three years clearly shows that the business is burdened by the excessive size of space it occupies." However, TCI expressed confidence that the store "can survive and meet its obligations if [it] shed its 'dead' space." PGC did not respond immediately in writing to TCI's business plan, but Appellants claim that PGC led them to believe that the business plan was being seriously considered by PGC.

In August 2003, TCI stopped paying rent due under the Lease. In a letter dated November 14, 2003, Stanley E. Krasniewski, the general manager for PGC, wrote to Jaress, informing him that: (1) TCI had a current outstanding balance due of $28,519.61; (2) TCI's lease term was due to expire on December 31, 2003; (3) the Landlord "cannot commit to a long term renewal agreement with [TCI] due to a possible pending lease transaction that could involve the leasing of the premises that Plaza Convenience now occupies"; and (4) "[r]egardless of the outcome to these lease negotiations, the Landlord values [TCI's] tenancy at [PGC], and would like to work with your client on retaining Plaza Convenience as a tenant." The letter closed with the following proposal:

The Landlord would like to propose the following:

1. The Landlord will extend the term of the current lease to March 31, 2004. Landlord's leasing agents will work with your client to downsize the current premises or find a mutually agreeable substitute premises.

2. The Landlord will reduce the monthly base rent from $4,462.50 to $2,231.25, retroactive back to August 1, 2003, and continued [(sic)] the base rent reduction through March 31, 2004, provided your client pays all outstanding rental charges, currently $18,695.89, by November 26, 2003.

On December 12, 2003, PGC's attorney wrote a letter to Jaress, notifying him that TCI was in serious default and owed PGC $32,785.78 in unpaid rent and related charges. The letter demanded payment of the unpaid balance by December 19, 2003. The letter also advised that if payment was not made by that time, "the Lease shall be immediately terminated and the Tenant shall be required to vacate and remove all personal property from the Premises. In the event the Tenant fails to vacate the Premises upon termination of the Lease, PGC shall immediately proceed with filing a complaint for summary possession and monetary damages in Honolulu District Court and/or pursuing any other remedies provided under the Lease and applicable law."

On January 7, 2004, PGC's attorney sent Jaress yet another letter, notifying him that TCI now owed $33,310.56 in unpaid rent, approximately $1,100.00 in December 2003 electricity costs, and $546.84 in attorney's fees and costs. Demand was made for payment of the total amount of $33,857.40, plus December 2003 electricity costs by January 22, 2004.

On January 9, 2004, however, Appellants filed the lawsuit underlying this appeal, on grounds that PGC had misled Kim into keeping TCI fully operational until the end of the Lease by actively concealing PGC's negotiations with potential tenants for the space being rented by TCI. Appellants claimed that because of PGC's conduct, Kim was forced to liquidate TCI's business assets in an unreasonably short period of time with no chance of business survival. Appellants sought damages for PGC's breach of the covenant of good faith and fair dealing, unfair competition in violation of Hawaii Revised Statutes (HRS) § 480-2, intentional infliction of emotional harm, and "intentional infliction of emotional harm forced liquidation[.]"

PGC counterclaimed, seeking damages from: (1) TCI for breach of the Lease; (2) John, pursuant to his personal guaranty of the Lease; and (3) Kim for breach of the Lease as assignor of the Lease to TCI. PGC also sought to pierce TCI's corporate veil and claimed damages against Kim, as TCI's sole shareholder, for using "the corporate fiction to perpetuate a fraud or defeat a rightful claim and/or engage[] in other improper conduct such that recognition of the corporate fiction would bring about injustice and inequity." John cross-claimed against Kim for indemnification and contribution.

Ultimately, the circuit court entered summary judgment orders and a final judgment in favor of Appellees on both the complaint and counterclaim. In its order granting PGC's motion

for summary judgment on all claims in the amended complaint, the circuit court found that

> (a) regarding Count I of the Amended Complaint, there was no breach of covenant of good faith and fair dealing since there was no allegation that [PGC] breached the lease agreement; (b) regarding Count II, there was no unfair competition since [PGC] only exercised its legal rights; and (c) regarding Counts III and IV, as to [Kim], there was no evidence of outrageous conduct or proof of extreme emotional distress, and as to [TCI], a corporate entity cannot suffer emotional distress as a matter of law.

In its order granting PGC's motion for summary judgment on all claims in PGC's first amended counterclaim against Kim, the circuit court found that

> (a) there is no question that the rent owed under the Lease Agreement was not paid by [TCI], and that [Kim], as guarantor, has not paid the rent; and (b) at the time of the hearing, [TCI] had filed a petition for bankruptcy, resulting in an automatic stay as to the corporation.

The circuit court also disqualified Jaress from serving as Appellants' attorney as he was likely to be a witness in the case since he had been heavily involved in Kim's negotiations and communications with PGC. Finally, the circuit court denied Appellants' motion for reconsideration of the summary judgment orders.

B.

In their points of error on appeal, Appellants allege that the circuit court erred in entering the following orders: (1) order, filed on October 7, 2004, granting PGC's motion to disqualify Appellants' counsel, filed on July 29, 2004; (2) order striking for lack of standing Appellants' supplemental memorandum of inability to obtain new counsel for the summary judgment motion hearing; and (3) order denying Appellants' motion for

reconsideration of the orders granting summary judgment as to the complaint and counterclaim.

However, Appellants failed to argue these points of error in their briefs. Accordingly, we deem these points of error waived and abandoned. Berkness v. Hawaiian Elec. Co., 51 Haw. 437, 438, 462 P.2d 196, 197 (1969).

C.

Appellants next contend that the circuit court erred in entering the summary judgment order in favor of Appellees on all claims in the amended complaint. We disagree with Appellants.

1.

As to Appellants' claim of damages for breach of the covenant of good faith and fair dealing, the Hawai'i Supreme Court has recognized that "every contract contains an implied covenant of good faith and fair dealing that neither party will do anything that will deprive the other of the benefits of the agreement." Best Place, Inc. v. Penn Am. Ins. Co., 82 Hawai'i 120, 123-24, 920 P.2d 334, 337-38 (1996). In Best Place, the supreme court observed:

> The obligation to deal in good faith is now a well-established principle of contract law. Restatement (Second) Contracts § 205 (1979) provides that "[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." In *Hawai'i Leasing v. Klein*, 5 Haw. App. 450, 456, 698 P.2d 309, 313 (1985), the Intermediate Court of Appeals (ICA) explicitly recognized that parties to a contract have a duty of good faith and fair dealing in performing contractual obligations. We also note that the parties to all commercial contracts in this jurisdiction are subject to a statutory duty to perform in good faith. *See* HRS § 490:1-203 (1993) (providing that "[e]very contract or duty within this chapter imposes an obligation of good faith in its performance or enforcement.").

Best Place, 82 Hawai'i at 124-25, 920 P.2d at 338-39 (emphases added, footnote omitted).

Subsequently, in Francis v. Lee Enters., 89 Hawai'i 234, 971 P.2d 707 (1999), the supreme court held that tort recovery for damages is not allowed "in the absence of conduct that (1) violates a duty that is independently recognized by principles of tort law and (2) transcends the breach of the contract." Id. at 244, 971 P.2d at 717.

In this case, Appellants have not claimed that Appellees breached a duty of good faith and fair dealing in the performance or enforcement of Appellees' contractual obligations under the Lease. Rather, Appellants are claiming that Appellees had a duty to negotiate in good faith an amendment to the existing Lease or a new lease more favorable to Appellants. Since no such duty existed under the Lease and Appellants have identified no such duty under independently recognized principles of tort law, the circuit court correctly held, as a matter of law, that no breach of the covenant of good faith and fair dealing occurred.

2.

Appellants claimed in their complaint that Appellees practiced unfair methods of competition, in violation of HRS § 480-2 (1993 & Supp. 2005), thus entitling Appellants to treble damages under HRS § 480-13 (1993 & Supp. 2002). HRS § 480-2 currently provides, as it did when the underlying lawsuit commenced, as follows:

> **Unfair competition, practices, declared unlawful.** (a) Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are unlawful.
>
> (b) In construing this section, the courts and the office of consumer protection shall give due consideration to the rules, regulations, and decisions of the Federal Trade Commission and the federal courts interpreting section 5(a)(1) of the Federal Trade Commission Act (15 U.S.C. 45(a)(1)), as from time to time amended.
>
> (c) No showing that the proceeding or suit would be in the public interest (as these terms are interpreted under section 5(b) of the Federal Trade Commission Act) is necessary in any action brought under this section.
>
> (d) No person other than a consumer, the attorney general or the director of the office of consumer protection may bring an action based upon unfair or deceptive acts or practices declared unlawful by this section.
>
> (e) Any person may bring an action based on unfair methods of competition declared unlawful by this section.

(Emphases added.)

In granting summary judgment against Appellants on the unfair competition claim, the circuit court held that "there was no unfair competition since [PGC] only exercised its legal rights[.]" Appellants contend on appeal that summary judgment was improperly granted because a question of fact exists as to whether Appellees practiced an unfair method of competing in the marketplace by engaging "in intentional dishonesty by misrepresenting, concealing or failing to disclose material facts relating to its intent to negotiate[.]" We disagree.

The Hawai'i Supreme Court has explained, with respect to the unfair competition cause of action set forth in HRS § 480-2, as follows:

> Although HRS § 480-2 does not define unfair competition, it "was constructed in broad language in order to constitute a flexible tool to stop and prevent unfair competition and fraudulent, unfair or deceptive business practices for the protection of both consumers and honest

> businessmen and businesswomen." *Han v. Yang*, 84 Hawai'i 162, 177, 931 P.2d 604, 619 (App. 1997) (quoting *Ai [v. Frank Huff Agency, Ltd.*], 61 Haw. [607] at 616, 607 P.2d [1304] at 1311) [(1980)] (footnote omitted) (some brackets added and some omitted); *see also* 6 *Von Kalinowski on Antitrust*, *supra*, § 111.07, at 111-18; 1 *Callmann on Unfair Competition*, *supra*, § 2.08, at 27-28; *Restatement (Third) of the Law of Unfair Competition* § 1, cmt. g, at 9-11 (1995). Generally speaking, competitive conduct "is unfair when it offends established public policy and when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers." *State ex rel. Bronster v. United States Steel Corp.*, 82 Hawai'i 32, 51, 919 P.2d 294, 313 (1996) (citations and brackets omitted). Further, section 5 of the [Federal Trade Commission Act] specifically dictates that it is an unfair method of competition to violate specific trade regulations, to attempt to circumvent antitrust statutes, or to engage in practices that "violate the spirit of antitrust laws." *Island Tobacco Co. v. R.J. Reynolds Industries Inc.*, 513 F. Supp. 726, 737 (D. Haw. 1981); *see also Cel-Tech Communications Inc.* [*v. Los Angeles Cellular Tel. Co.*], 83 Cal. Rptr. 2d [548] at 560-565, 973 P.2d 527 [at 538-543 (1999)] ("the word 'unfair' means conduct that (1) threatens an incipient violation of an antitrust law, or (2) violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or (3) otherwise significantly threatens or harms competition."[].]

Robert's Hawaii School Bus, Inc. v. Laupahoehoe Transp. Co., 91 Hawai'i 224, 255 n.34, 982 P.2d 853, 884 n.34 (1999) (brackets and ellipsis omitted).

In this case, Appellants are not competitors of Appellees and have articulated no conduct engaged in by Appellees that constituted an "unfair method[] of competition declared unlawful by [HRS § 480-2]." Appellees were under no duty to negotiate an extension of the Lease or modification of the terms of the Lease, and the clear terms of the Lease provided that the Lease would expire on December 31, 2003. Under the circumstances, the circuit court did not err in concluding, as a matter of law, that no question of fact existed as to Appellants' unfair competition claim.

3.

Appellants also contend that the circuit court improperly granted summary judgment against them on their claim of intentional infliction of emotional distress. In Francis v. Lee Enters., the Hawai'i Supreme Court held that "damages for emotional distress will only be recoverable where the parties specifically provide for them in the contract or where the nature of the contract clearly indicates that such damages are within the parties' contemplation or expectation in the event of a breach." Id. at 244, 971 P.2d at 717. Since neither condition is present here, we disagree.

4.

Finally, Appellants argue that the circuit court incorrectly granted summary judgment on Appellees' counterclaim for past-due rent under the theory of piercing the corporate veil because no facts were adduced of Kim's "attempt to shield herself from liability[.]"

The record reveals, however, that the counterclaim was predicated on Kim's personal guaranty of TCI's obligations under the Lease. Based on our review of the guaranty documents in the record, we conclude that the circuit court did not err in granting summary judgment in Appellees' favor on the counterclaim.

CONCLUSION

Based on our review of the record on appeal and the briefs submitted by the parties, and having duly considered the

case law and statutes relevant to the arguments advanced by the parties, we affirm the orders and judgment challenged by Appellants in this appeal.

DATED: Honolulu, Hawai'i, September 21, 2006.

Corinne K.A. Watanabe

Daniel R. Foley

On the briefs:

R. Patrick Jaress and
Robert K. Matsumoto
for plaintiffs-appellants.

Lex R. Smith and
Jesse W. Schiel
(Kobayashi, Sugita & Goda)
for defendants-appellees.