

NOT FOR PUBLICATION IN WEST'S HAWAI'I REPORTS AND PACIFIC REPORTER

NO. 27002

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

HT & T COMPANY, a division of Brewer Environmental Industries, LLC, by BEI HOLDINGS, INC., Plaintiff-Appellee, v. HAWAII STEVEDORES, INC., a Hawaii corporation, Defendant-Appellant

APPEAL FROM THE CIRCUIT COURT OF THE THIRD CIRCUIT
(Civ. No. 02-1-148)

SUMMARY DISPOSITION ORDER

(By: Foley, Presiding Judge, Nakamura and Fujise.)

Defendant-Counterclaim Plaintiff-Appellant Hawaii

Stevedores, Inc. (HSI) appeals from the December 7, 2004 Judgment by the Circuit Court of the Third Circuit (circuit court)¹ in favor of Plaintiff-Counterclaim Defendant-Appellee HT&T Company (HT&T).

In accordance with Hawai'i Rules of Appellate Procedure (HRAP) Rule 35, and after carefully reviewing the arguments and issues raised, the record and the briefs submitted by the parties, and duly considering and analyzing the law relevant thereto, we resolve the points on appeal as follows:

1. The circuit court did not err in finding that HSI and HT&T entered into a contract which was missing the essential term of price. "Whether . . . the parties entered into an agreement is essentially a question of fact." Island Directory Co., Inc. v. Iva's Kinimaka Enters., Inc., 10 Haw. App. 15, 23, 859 P.2d 935, 940 (1993). Findings of fact are sustained unless clearly erroneous. Id.; Waugh v. Univ. of Hawaii, 63 Haw. 117, 132, 621 P.2d 957, 969 (1980).

It is undisputed that HSI requested HT&T render stevedore services in the Port of Hilo for HSI's customers, that HT&T agreed to provide the stevedores but notified HSI that it

¹ The Honorable Greg K. Nakamura presided.

K. HANAKADO
CLERK APPELLATE COURTS
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would not agree to the labor loan rate, that HT&T and HSI did not agree as to a price to be paid for HT&T's stevedore services, but that HT&T provided the stevedore services and HSI used these stevedores in their Hilo operations for Norwegian Cruise Lines (NCL). Moreover, it is also undisputed that HSI thereafter continued to request stevedore services from HT&T, that HT&T continued to provide these services, and that both maintained their respective, differing positions as to rate.

Therefore, the record supports the circuit court's finding that the parties sufficiently bargained for a contract for services without reaching an agreement as to price. See Durette v. Aloha Plastic Recycling, Inc., 105 Hawai'i 490, 504, 100 P.3d 60, 74 (2004) ("there must be evidence that defendant requested plaintiff to render the services or assented to receiving their benefit under circumstances negating any presumption that they would be gratuitous") (quoting Wall v. Focke, 21 Haw. 399, 404-05 (1913)).

2. Where the parties did not agree on the term of price, the circuit court did not err in setting a reasonable rate² for the stevedoring services that was more than the labor

² The Restatement (Second) of Contracts § 204 cmt. d (1979), Supplying An Omitted Essential Term, provides:

d. Supplying a term. The process of supplying an omitted term has sometimes been disguised as a literal or a purposive reading of contract language directed to a situation other than the situation that arises. Sometimes it is said that the search is for the term the parties would have agreed to if the question had been brought to their attention. Both the meaning of the words used and the probability that a particular term would have been used if the question had been raised may be factors in determining what term is reasonable in the circumstances. *But where there is in fact no agreement, the court should supply a term which comports with community standards of fairness and policy rather than analyze a hypothetical model of the bargaining process.* Thus where a contract calls for a single performance such as the rendering of a service or the delivery of goods, the parties are most unlikely to agree explicitly that performance will be rendered within a "reasonable time;" but if no time is specified, a term calling for performance within a reasonable time is supplied. See Uniform Commercial Code §§ 1-204, 2-309(1). *Similarly, where there is a contract for the sale of goods*

(continued...)

loan rate established by the Stevedore Industry Committee of Hawaii (SIC).

a. HSI failed to establish that the labor loan rate was the applicable "custom and practice" rate for the stevedoring services provided by HT&T in this case. "Usage is habitual or customary practice." Restatement (Second) of Contracts (Restatement) § 219 (1979). Conversely, all of the SIC members testified that HSI's application of the labor loan rate in this case was unprecedented.

b. The circuit court did not err in admitting HT&T's Exhibit 17, a summary of HT&T's costs associated with the stevedore labor provided to HSI, into evidence. Hawaii Rules of Evidence (HRE) Rule 1006 (1993).³

HSI states, in conclusory fashion, that the admission of Exhibit 17 "effectively denied [it] full opportunity to cross-examine Mr. [Ray] Kuruwara on the exhibit and his opinions formed in reliance thereon," but does not state how this was true. HSI also argues that Exhibit 17 was "merely a summary exhibit generated by [HT&T] for purposes of trial." However, HRE Rule 1006 expressly allows the admission of summaries and does not foreclose the admission of those summaries prepared for purposes of litigation.

Finally, HSI argues that the underlying materials to Exhibit 17 were unavailable and consisted of "limited data from

²(...continued)

but nothing is said as to price the price is a reasonable price at the time for delivery. See Uniform Commercial Code § 2-305.

(Emphasis added).

³ HRE Rule 1006 (1993) provides:

Summaries. The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court.

which substantive assumptions were made." Although HSI objected to Exhibit 17 because, it argued, it did not have the opportunity prior to trial to examine the underlying documentation, it did not dispute that it had not asked for such an opportunity despite having received a copy of Exhibit 17 a week before trial. Moreover, based on the record, after the circuit court ruled that Ray Kuruahara (Kuruahara) could be cross-examined regarding the underlying facts or data and that the documentation could be requested at that time, HSI failed to ask that the documents be produced. Under these circumstances, HSI abandoned its claim to examination of the data underlying Exhibit 17.

c. HSI argues that it was error for the circuit court to include a ten percent profit, as well as "components of overhead" in determining the reasonable rate. However, as HSI fails to provide any discernable argument in support of this point, we decline to address it. HRAP Rule 28(b)(7).

d. HSI has waived its point that the circuit court erred in precluding disclosure of the rates HT&T charged Matson Terminals, Inc. by failing to provide any supporting argument. Id. In addition, the transcript of the proceedings during which the circuit court is alleged to have made this ruling is not part of the record on appeal. Without this transcript, there is an insufficient record to review this point. See Bettencourt v. Bettencourt, 80 Hawai'i 225, 230, 909 P.2d 553, 558 (1995).

3. The circuit court did not err in ruling "it cannot be said that as a matter of law the only reasonable rate and circumstances would be the labor rate" and in denying HSI's oral motion for "directed verdict." While the trial court's ruling on a motion for judgment as a matter of law is reviewed *de novo*, Aluminum Shake Roofing, Inc. v. Hirayasu, 110 Hawai'i 248, 251, 131 P.3d 1230, 1233 (2006), HSI provides no argument, save a reference to "the argument presented above", and a claim that there was an "absence of any contrary evidence on industry custom and usage" in support of this third point of error. Points of

error not argued may be deemed waived by this court under HRAP Rule 28(b)(7).⁴

Finally, under Hawai'i Rules of Civil Procedure (HRCP) Rule 52(c), the circuit court was authorized to "decline to render any judgment until the close of all the evidence." Therefore, the circuit court's denial of HSI's oral motion for a directed verdict was not error.

4. The circuit court did not err in rendering its January 6, 2004 "Amended Decision and Order Granting in Part and Denying in Part Plaintiff HT&T Company's Motion for Summary Judgment on the Second Amended Complaint and Counterclaim Filed August 7, 2003," insofar as it granted summary judgment in HT&T's favor on HSI's breach of contract (Count II) and abuse of process (Count I) counterclaims.

As to the breach of contract counterclaim, HSI does not dispute the circuit court's findings that there was no express agreement between HSI and HT&T, that the labor loan rates would apply to this lawsuit, and that there was no admissible evidence that the SIC, as an organization, took the position that the labor loan rates would apply "where the entity requesting the labor did not have a physical facility and resident employees in the port at which the labor was to be provided." Indeed, most of the SIC members stated that whether the labor loan rate would apply in a case where the borrowing company had no physical presence in the port was a "precedent setting situation" and not covered by the collective bargaining agreements (CBA). Therefore, once the circuit court determined that the parties did not enter into a "labor loan agreement," i.e., that they did not agree that the labor loan rate would apply to the services rendered in this case, there was no genuine issue of material fact as to whether HT&T breached the alleged labor loan agreement.

⁴ In any event, the SIC members' testimony contradicts HSI's claim that there was no evidence that the labor loan rate did not apply to the parties' situation.

There was no evidence of a "wilful act in the use of the process which [was] not proper in the regular conduct of the proceeding" in support of HSI's counterclaim Count I for abuse of process/frivolous lawsuit. Chung v. McCabe Hamilton & Renny Co., Ltd., 109 Hawai'i 520, 529, 128 P.3d 833, 842 (2006) (quoting Wong v. Panis, 7 Haw. App. 414, 420, 772 P.2d 695, 699-700 (1989)) (internal quotation marks omitted). HT&T filed the lawsuit after notifying HSI that HT&T planned to charge its customary commercial rate, performing services on behalf of HSI, and after not receiving what it considered full payment from HSI for HT&T's services. For a claim to be frivolous, "it must be manifestly and palpably without merit." Coll v. McCarthy. 72 Haw. 20, 29, 804 P.2d 881, 887 (1991) (quoting R.W. Meyer, Ltd. v. McGuire, 36 Haw. 184, 187, (1942)) (internal quotation marks omitted). It cannot be said in this case that HT&T's attempts to recover full payment from HSI for HT&T's services were "manifestly and palpably without merit."

5. HSI's fifth point of error challenges the circuit court's May 19, 2004 Order Granting in Part HT&T's Renewed Motion for Summary Judgment on the Second Amended Complaint and the July 6, 2004 Order Denying HSI's Motion for Reconsideration of the May 19, 2004 Order. HSI argues that the circuit court erred in limiting its evidence on counterclaim Counts III (restraint of trade in violation of Hawaii Revised Statutes (HRS) § 480-9 (1993)⁵) and IV (Unfair Method of Competition under HRS § 480-2

⁵ HRS § 480-9 (1993) states:

Monopolization. No person shall monopolize, or attempt to monopolize, or combine or conspire with any other person to monopolize any part of the trade or commerce in any commodity in any section of the State.

(1993 and Supp. 2007)⁶) to direct communications between an HT&T representative and an HSI customer.

To sue for damages for any violation of HRS Chapter 480, one must satisfy the requirements of HRS § 480-13 (Supp. 2007).⁷ That is, HSI had to present evidence proving (1) a violation of HRS Chapter 480; (2) injury to HSI's business or

⁶ HRS § 480-2 (1993 and Supp. 2007) reads:

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.

⁷ HRS § 480-13 (Supp. 2007) reads, in relevant part:

Suits by persons injured; amount of recovery, injunctions. (a) Except as provided in subsections (b) and (c), any person who is injured in the person's business or property by reason of anything forbidden or declared unlawful by this chapter:

(1) May sue for damages sustained by the person, and, if the judgment is for the plaintiff, the plaintiff shall be awarded a sum not less than \$1,000 or threefold damages by the plaintiff sustained, whichever sum is the greater, and reasonable attorney's fees together with the costs of suit; provided that indirect purchasers injured by an illegal overcharge shall recover only compensatory damages, and reasonable attorney's fees together with the costs of suit in actions not brought under section 480-14(c); and

(2) May bring proceedings to enjoin the unlawful practices, and if the decree is for the plaintiff, the plaintiff shall be awarded reasonable attorney's fees together with the costs of suit.

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violation of HRS Chapter 480; (2) injury to HSI's business or property; (3) the amount of HSI's damages; and (4) the action was in the public interest. Robert's Hawaii Sch. Bus. Inc. v. Laupahoehoe Transp. Co., Inc., 91 Hawai'i 224, 254, 982 P.2d 853, 883 (1999), superseded by statute on other grounds as stated in Hawai'i Med. Ass'n v. Hawai'i Med. Serv. Ass'n, Inc., 113 Hawai'i 77, 148 P.3d 1179 (2006).

In response to the circuit court's order, HSI identified the acts relied upon in these counts as HT&T's "decision to abandon the labor loan agreement or otherwise carve out a sole exception to the labor loan practice . . . , even if deemed legal, per se, was motivated by [HT&T's] desire to maintain a monopoly for stevedore services in the port of Hilo and to exclude competition" and "HT&T's efforts to preclude or impede HSI's stevedore services in Hilo by attempting to have local labor 'stand down' in contravention of the collective bargaining agreement and by creating an environment of uncertainty for HSI's customers[.]" HSI attached a declaration attesting that HSI incurred expenditures of time and money as a result of HT&T's actions.

The circuit court did not err in dismissing Count III in its entirety. The circuit court had already ruled that HSI failed to establish that the labor loan rate applied to the HT&T stevedoring services involved in this case when it ruled on this motion. HSI provided no evidence that HT&T's insistence on its commercial rate was based on an intent to exclude HSI from the Port of Hilo.⁸ Although HSI argues that HT&T tried to "close the Port of Hilo" when HSI refused to pay HT&T's commercial rate, the record reflects that any such attempt on HT&T's part was based on

⁸ On appeal, HSI does not point to evidence supporting its claim that HT&T sought to exclude HSI from the Port of Hilo, except to cite generally to almost a hundred pages of record and the documents forming the procedural history in support and in opposition to this motion for summary judgment. HSI does not identify the evidence, if any, within those citations, that it believes supports its allegations, and this court will not speculate as to the evidence HSI believes supports these assertions of fact.

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HSI's stated intention to bring in labor from Oahu in violation of the CBA requiring the use of local labor. In fact, HSI's own evidence established this was more than a threat, as HSI claims as damages the costs of transporting that labor. On this failure of proof alone, the circuit court was correct in dismissing counterclaim Count III.⁹

The circuit court's limitation of counterclaim Count IV was supported by HSI's own statement of the basis for its claim. When asked to provide a "clear statement" of the basis for its claim, HSI relied upon the efforts it expended to reassure *its customers* that HSI would be able to perform its commitments to these customers. Given HSI's own statement of the basis for its counterclaim Count IV, it was not error for the circuit court to limit evidence to this basis.

6. The circuit court did not abuse its discretion in quashing HSI's August 25, 2004 subpoena duces tecum issued to Kuruhara. HSI sought:

Any and all back-up or supporting documents, including computer files, relied upon by HT&T to establish amounts claimed due and owing by HSI in this lawsuit, as reflected in HT&T's trial exhibit #27 provided to HSI's counsel on or about August 16, 2004, including, without limitation, daily time reports and other records reflecting:

1. the date of work;
2. the vessel worked;
3. the identity and number of Hilo stevedores/machine operators used by HSI for work in Hilo; and
4. the number of hours worked.

HSI claims on appeal that these materials were also "the subject of an outstanding discovery request served upon [] HT&T on October 7, 2002."¹⁰ However, HSI does not identify which of the

⁹ We also note that despite the dismissal of counterclaim Count III, HSI was allowed to submit instructions and a special interrogatory to the jury regarding the law on monopoly and asking for their specific finding. The jury found HSI failed to prove its monopoly claim.

¹⁰ The only citation to the record provided by HSI on this point is to a single page of transcript of the voir dire regarding HT&T's Exhibit 17, conducted on December 1, 2003 and attached to HSI's memorandum in opposition to HT&T's motion to quash.

11 items in its October 7, 2002 request sought production of the items specified in its August 25, 2004 subpoena duces tecum.

More importantly, the record reveals HSI had in its possession at the time of service of the August 25, 2004 subpoena, most if not all of the documents specified therein. In his declaration in support of the motion to quash, Kuruhara declared that:

4. The only thing not reflected by source documents in the proposed Trial Exhibits of HT&T is the amount of HSI's man hours that were originally billed but then removed to recalculate the amount due based on the rate ruling resulting from the December 2003 trial. This information is also already available to HSI because it knows the number of hours its men worked for its customers in Hilo and removed those hours before paying any invoices from HT&T.

5. The other information sought, such as the date of the work, the vessel worked, the number of Hilo stevedores/machine operators used by HSI and the number of hours worked are contained in the invoices which are on HT&T's trial Exhibit List.

At the hearing on the motion to quash, HSI's counsel stated that the parties had some prior discussion on the discovery issue and the documentation for a specific date of services, it was confirmed at the hearing, was available.¹¹ After granting the motion to quash, the circuit court continued,

. . . . But as I mentioned in our discussion off the record that there is rule one thousand six, dealing with summaries, and regardless of whether or not their -- what is a discovery request previously made with respect to documents to support summaries, the court can order that they be produced in court. And so that's why I suggested to [HT&T counsel] that he try to make the documents available, so at least we can have the trial run a little bit smoother.

HSI has not shown, by citation to the record, any indication that HT&T failed to make the documents discussed available to HSI.

"On review, the action of a [circuit court] in enforcing or

¹¹ HSI's counsel stated, "December 16th 2002, is the one specific date that I would like to look at the documents with reference to. And other than that, my having an opportunity to look at exemplar documents will be sufficient. And those should be able to be pulled from any portion of the records they've been able too [sic] get." HT&T's counsel responded, "Mr. Kuruhara did get, over the weekend, what was readily available to him, and those are reports that have a lot more detail in them about each vessel's servicing. They are called a vessel cost report and . . . a labor loan out port report . . . by vessel [W]e do have December 16, '02 with that kind of detail."

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quashing [a] subpoena will be disturbed only if plainly arbitrary and without support in the record." Bank of Hawaii v. Shaw, 83 Hawai'i 50, 59, 924 P.2d 544, 553 (App. 1996) (quoting Powers v. Shaw, 1 Haw. App. 374, 376, 619, P.2d 1098, 1101 (1980)) (internal quotation marks and citation omitted). We see no abuse here.

7. The circuit court did not abuse its discretion in its award of attorneys' fees, costs, and pre-judgment interest. The granting of attorney's fees is reviewed under the abuse of discretion standard. Chun v. Bd. of Trs. of the Employees' Ret. Sys. of the State of Hawai'i, 106 Hawai'i 416, 431, 106 P.3d 339, 354 (2005).

HSI's contention that attorneys' fees and costs should not have been awarded as HT&T was not the prevailing party in this lawsuit because HT&T's claim was based upon "an express breach of contract" is without merit. A prevailing party is "the litigant in whose favor judgment is rendered[.]" Wong v. Takeuchi, 88 Hawai'i 46, 49, 961 P.2d 611, 614 (1998) (quoting 10 C. Wright, A. Miller & M. Kane, Federal Practice and Procedure: Civil 2d § 2667 (1983)) (internal quotation marks omitted). A party who prevails on the main issue, even if "not to the extent of his original contention, [] will be deemed to be the successful party for the purpose of taxing costs and attorney's fees." MFD Partners v. Murphy, 9 Haw. App. 509, 514, 850 P.2d 713, 716 (1992) (internal brackets removed) (quoting Food Pantry, Ltd. v. Waikiki Bus. Plaza, Inc., 58 Haw. 606, 620, 575 P.2d 869, 879 (1978)). HT&T was awarded judgment and damages for their claim of underpayment against HSI. HT&T was therefore the prevailing party for the purposes of an attorneys' fees and costs award.

HSI's challenge to the circuit court's award of statutory interest, running from February 21, 2004 is also

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authorize the award of statutory interest commencing from the "the date when the breach first occurred" in breach of contract cases. The circuit court awarded interest running after the date it determined HT&T was entitled to more than the labor loan rate of payment and nearly two years after HSI failed to submit full payment of HT&T's invoices. On this record, there was no abuse of discretion.

Therefore,

IT IS HEREBY ORDERED that the December 7, 2004 Judgment of Circuit Court of the Third Circuit is hereby affirmed.

DATED: Honolulu, Hawai'i, May 20, 2008.

On the briefs:

Robert P. Richards and
Michele-Lynn E. Luke,
for Defendant-Appellant.


Presiding Judge

Gary G. Grimmer and
Melissa H. Lambert,
(Carlsmith Ball),
for Plaintiff-Appellee.


Associate Judge


Associate Judge

¹²(...continued)

date to conform with the circumstances of each case, provided that the earliest commencement date in cases arising in tort, may be the date when the injury first occurred and in cases arising by breach of contract, it may be the date when the breach first occurred.