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NO. 27437

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

ROBERT J. STONE and JUDY S. STONE, Plaintiffs-Appellees, v. SUN AND SEA REALTY, INC., a Hawaii corporation; DOUGLAS J. LEOPOLD; LARRY C. CLUTTER, JOHN DOES 1-10, DOE CORPORATIONS, PARTNERSHIPS, and ENTITIES 1-10, Defendants-Appellants

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K. HAMAKADO
CLERK, APPELLATE COURTS
STATE OF HAWAI'I

APPEAL FROM THE CIRCUIT COURT OF THE THIRD CIRCUIT
(Civ. No. 04-1-118K)

SUMMARY DISPOSITION ORDER
(By: Recktenwald, C.J., Nakamura and Fujise, JJ.)

Defendants-Appellants Sun and Sea Realty, Inc. (Sun and Sea Realty), Douglas J. Leopold (Leopold), and Larry C. Clutter (Clutter) (collectively, Defendants) appeal from the July 11, 2005 final judgment of the Circuit Court of the Third Circuit (circuit court)[1] in favor of Plaintiffs-Appellees Robert J. Stone and Judy S. Stone (Stones). This appeal stems from a contract for the sale of property located in Kona Paradise Park Subdivision in the District of South Kona, Hawai'i (Property).

After a careful review of the issues raised, arguments advanced, applicable law, and the record in the instant case, we resolve Defendants' points of error[2] on appeal as follows:

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[1] The Honorable Elizabeth A. Strance presided.

[2] Sun and Sea Realty's "Concise Statement of Points of Error" fails to comply with the requirements of Hawai'i Rules of Appellate Procedure (HRAP) Rule 28(b)(4) in that it fails to show where in the record the error occurred, where it was objected to, and fails to quote the challenged findings, conclusions or rulings complained of. "[F]ailure to comply with HRAP [Rule] 28(b)(4) is alone sufficient to affirm the judgment of the circuit court." O'Connor v. Diocese of Honolulu, 77 Hawai'i 383, 385, 885 P.2d 361, 363 (1994); Bettencourt v. Bettencourt, 80 Hawai'i 225, 228, 909 P.2d 553, 556 (1995); City & County of Honolulu v. Kailua Auto Wreckers, Inc., 66 Haw. 532, 533, 668 P.2d 34, 35 (1983). However, it is also the practice of the appellate courts in this jurisdiction "to permit litigants to appeal and to have their cases heard on the merits, where possible." O'Connor, 77 Hawai'i at 386, 885 P.2d at 364. Counsel is cautioned that future violations may result in sanctions. HRAP Rule 30.

1. In their first three points of error, Defendants argue that the circuit court erred in granting the Stones' Motion for Summary Judgment (Motion). The circuit court's grant or denial of summary judgment is reviewed by the appellate courts de novo. Querubin v. Thronas, 107 Hawai'i 48, 56, 109 P.3d 689, 697 (2005).

a. Defendants argue that the circuit court erred in granting the Stones' Motion because there were genuine issues of material fact as to (i) the date upon which construction of the house was to be completed; (ii) whether the Stones breached the Deposit Receipt Offer and Acceptance (DROA), and were therefore in default, by failing to deposit the balance of the down payment into escrow before the scheduled closing date; and (iii) whether Defendants failed to perform their obligations under the DROA.

i. Although not specified in the DROA, the construction completion date was not a material fact that would preclude the circuit court from granting summary judgment in this matter. See Crichfield v. Grand Wailea Co., 93 Hawai'i 477, 482-83, 6 P.3d 349, 354-55 (2000) ("A fact is material if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or defense asserted by the parties.") (internal quotation marks and citation omitted). The supposed uncertainty of the completion date for construction does not prevent the enforcement of the DROA. See Bishop Trust Co., Ltd. v. Kamokila Dev. Corp., 57 Haw. 330, 334, 555 P.2d 1193, 1196 (1976) ("The agreement did not provide a time for performance of the development, and must be read as requiring that performance be commenced within a reasonable time.").

ii. There was no genuine issue of material fact as to whether the Stones breached the DROA by failing to deposit the balance of the down payment into escrow before the scheduled closing date. While Defendants challenge the circuit court's finding that the Stones had funds available and were ready,

willing, and able to deposit the balance of their down payment for the subject transaction pursuant to the terms of the DROA, the evidence presented to the circuit court, that the Stones had funds on deposit in excess of the down payment balance of $60,800 at the time of the scheduled closing date through the filing of this lawsuit, was uncontradicted. As Defendants had not begun construction of the house by the scheduled closing date and the Stones were aware of this failure at the time of the scheduled completion date, they were not required to make the futile gesture of transferring their funds into escrow under these circumstances. See Francone v. McClay, 41 Haw. 72, 85, (1955) ("Where a tender of the consideration is rendered useless by the conduct of defendant, it is sufficient on the part of plaintiff to set forth in his complaint that he is ready, able, and willing to pay the consideration, or that plaintiff pays the consideration into court.") (internal quotation marks and citation omitted).

iii. Defendants have failed to show a genuine issue of material fact as to whether they failed to perform their obligations under the DROA. Defendants contend that their denial of receiving the "Pre-qualification Certificate" and their good faith belief that the house plans were not in compliance with the Architectural Review Committee (ARC) design standards presented genuine issues of material fact which should have precluded summary judgment. However, evidence that the plans for the house were approved by the ARC was undisputed by Defendants. Likewise, evidence that the Stones' mortgage company timely sent a facsimile copy of the Stones' pre-qualification letter to Clutter was not disputed by Clutter. In any event, under paragraphs C-20 and C-27 of the DROA, Defendants waived their right to terminate the contract for failure to timely receive the Stone's pre-qualification letter by failing to give notice of termination within five days of the deadline for the letter.

b. Defendants have failed to show ambiguities in the DROA that would prevent its enforcement. Although Defendants

argue paragraphs C-6 and C-67(1) create an ambiguity, they do not provide a reasonable construction of those provisions that would present an ambiguity preventing the enforcement of the contract. In any event, "ambiguous terms are construed against the party who drafted the contract." Luke v. Gentry Realty, Ltd., 105 Hawai'i 241, 249, 96 P.3d 261, 269 (2004).

2. In their fourth point of error, Defendants argue that the circuit court erred in denying their request to continue the proceedings for an additional ninety days to allow them to conduct further discovery. "[T]he extent to which discovery is permitted under [Hawai'i Rules of Civil Procedure] Rule 26 is subject to considerable latitude and the discretion of the trial court. Thus, the exercise of such discretion will not be disturbed in the absence of a clear abuse of discretion that results in substantial prejudice to a party." Hac v. Univ. of Hawai'i, 102 Hawai'i 92, 100-101, 73 P.3d 46, 54-55 (2003) (internal quotation marks, brackets and citation omitted). As Defendants had eight months to conduct their discovery before the Motion was heard and gave no reasons explaining their failure to conduct any discovery during that time, it was not an abuse of discretion for the circuit court to deny this request.

3. In their third point of error, Defendants nominally challenge virtually all of the circuit court's conclusions of law but provide no record citations to evidence supporting their arguments nor do they provide citations to legal authority for their position that these conclusions were in error. As it is for appellants to support their position that reversible error occurred, we decline to address this point. HRAP Rule 28(b)(4) and (7).

4. In their fifth and final point of error, Defendants argue that it was error to award attorneys' fees and costs to the Stones, based solely on their contention that it was error to do so where the motion for summary judgment was erroneously granted. As we reject Defendants' arguments that summary judgment was

improperly entered in the Stones' favor, this argument is also without merit.

Therefore,

IT IS HEREBY ORDERED that the July 11, 2005 judgment of the Circuit Court of the Third Circuit is affirmed.

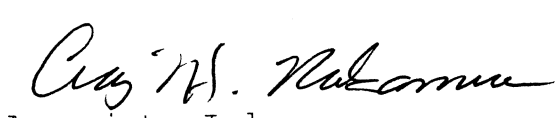
DATED: Honolulu, Hawai'i, October 16, 2008.

On the briefs:

Robert D. Triantos and
Edmund W.K. Haitsuka,
(Carlsmith Ball),
for Defendants-Appellants.

Kenneth A. Ross and
Devon I. Peterson,
(Rush Moore),
for Plaintiffs-Appellees.

Chief Judge



Associate Judge

Associate Judge