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STATE OF HAWAII
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NO. 28540

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

HAWAII RESERVES, INC. a Hawaii corporation,
Plaintiff-Appellee,
v.
HAWAII FARM FRESH SEAFOOD, LLC., a Hawaii registered
Limited Liability Company, and John Dehart Wollstein,
Defendants-Appellants

APPEAL FROM THE DISTRICT COURT OF THE FIRST CIRCUIT,
HONOLULU DIVISION
(CIVIL NO. 1RC 06-1-4923)

SUMMARY DISPOSITION ORDER
(By: Foley, Presiding Judge, Fujise and Leonard, JJ.)

Defendants-Appellants Hawaii Farm Fresh Seafood, LLC, a Hawaii registered limited liability company, and John Dehart Wollstein (collectively, Defendants) appeal from the Judgment filed on May 1, 2007 in the District Court of the First Circuit, Ko'olauloa Division (district court).[1] The district court entered judgment in favor of Plaintiff-Appellee Hawaii Reserves, Inc., a Hawai'i corporation, (Plaintiff) and against Defendants in the amount of $20,000.00.

On appeal, Defendants contend the district court erred by granting summary judgment in favor of Plaintiff because (1) there was an issue of material fact as to the terms of a settlement agreement; (2) there was an issue of material fact as to whether Defendants met a December 26, 2006 deadline for performance and therefore whether they were in breach of a settlement agreement; (3) time was not of the essence; (4) a $20,000.00 payment was unenforceable as liquidated damages; and

[1] The Honorable Hillary B. Gangnes presided.

(5) there was an issue of material fact whether Plaintiff caused a breach of a settlement agreement.

Upon careful review of the record and the briefs submitted by the parties and having given due consideration to the arguments advanced and the issues raised by the parties, we resolve Defendants' points of error as follows:

Defendants negotiated and agreed to pay Plaintiff $20,000.00 if they failed to remove the houses by December 26, 2006. Defendants cannot complain that the Settlement Agreement they negotiated and agreed to is too harsh or inequitable such that it amounts to an impermissible forfeiture. 1029 Sixth, LLC v. Riniv Corp., 9 A.D.3d 142, 151, 777 N.Y.S.2d 122, 127-28 (2004). Therefore, the district court did not err by holding that the payment was not a "liquidated damages provision or a penalty as interpreted by Defendants."

However, there was a genuine issue of material fact that precluded summary judgment in favor of Plaintiff. "Generally, contract performance is excused when it is hindered or rendered impossible by the other party." Zobel & Dahl Constr. v. Crotty, 356 N.W.2d 42, 45 (Minn. 1984). "[E]very contract contains an implied condition that each party will not unjustifiably hinder the other from performing." Id. Defendants raised a genuine issue of material fact regarding their defense of impossibility. In opposition to Plaintiff's motion for summary judgment, Defendants submitted a memorandum, Wollstein's declaration, and photographs of the road. Defendants contended that Plaintiff owned the road to the houses, Plaintiff had an implied duty to not hinder Defendants from removing the houses by maintaining a passable road, and Plaintiff failed to maintain a passable road. Plaintiff did not dispute that it controlled the road. Whether the road was impassable and whether Plaintiff hindered the Defendants from removing the houses because

Plaintiff failed to maintain the road are disputed material facts that require an evidentiary hearing.

Additionally, whether Plaintiff and Defendants had an enforceable settlement agreement in which time was of the essence was also a genuine issue of material fact that precluded summary judgment. "Time is of the essence under an agreement if made so expressly or where such intention is clearly manifested from the agreement as a whole, construed in the light of the surrounding facts," in actions at law and equity. Kipahulu Inv. Co. v. Seltzer P'ship, 4 Haw. App. 625, 630, 675 P.2d 778, 782 (1983). There was no "time is of the essence" clause in the settlement agreement. Therefore, the district court was required to consider extrinsic evidence and make findings of fact on this issue. Id. at 631, 675 P.2d at 783. Assuming arguendo that time was of the essence, whether Defendants waived this condition would be another genuine issue of material fact precluding summary judgment. Stevens v. Cliffs at Princeville Assoc., 67 Haw. 236, 684 P.2d 965 (1984).

Therefore,

The Judgment filed on May 1, 2007 in the District Court of the First Circuit, Ko'olauloa Division, is affirmed in part and vacated in part, and this case is remanded for an evidentiary hearing.

DATED: Honolulu, Hawai'i, September 26, 2008.

On the briefs:

George W. Van Buren
Robert G. Campbell
John B. Shimizu
(Van Buren Campbell & Shimzu)
for Defendants-Appellants.

Randall Y. Kunn Char
for Plaintiff-Appellee.

Daniel R. Foley
Presiding Judge

Associate Judge

Associate Judge