

NO. 28209

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

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TOUR2000 CO., LTD., a foreign corporation,
Plaintiff-Appellant, v. KOREANA TOUR SERVICE, INC., a
Hawai'i corporation, and TAE SIK HA, Defendants/
Cross-Claim Defendants/Appellees; LEE KIM,
Defendant/Cross-Claimant/Appellee; and DOES 1-100,
Defendants

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(Civ. No. 03-1-1629)

MEMORANDUM OPINION

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

Plaintiff-Appellant Tour2000 Co., Ltd. (Tour2000) appeals from (1) the Hawai'i Rules of Civil Procedure (HRCP) Rule 54(b) certified final judgment in favor of Defendant/Cross-Claimant/Appellee Lee Kim (Kim), entered by the Circuit Court of the First Circuit (circuit court)¹ on September 11, 2006 (Final Judgment); and (2) the "Findings of Fact, Conclusions of Law and Order Granting [Kim's] Motion for Summary Judgment as to Counts II, III, and V of [Tour2000's] Complaint" (Summary Judgment).

The dispositive question on appeal is whether the circuit court properly granted summary judgment in Kim's favor as to Counts II (conspiracy to defraud) and III (unfair and deceptive practices) of Tour2000's complaint.² We answer this question in the affirmative and, accordingly, affirm the Final Judgment and the Summary Judgment.

¹ The Honorable Randal K. O. Lee presided over all proceedings relevant to this appeal.

² In its opening brief, Tour2000 has not raised any arguments regarding the circuit court's grant of summary judgment in Kim's favor as to Counts IV (interference with contractual relations) and V (punitive damages). Accordingly, Tour2000 has waived any error as to those counts. Berkness v. Hawaiian Elec. Co., 51 Haw. 437, 438, 467 P.2d 196, 197 (1969).

BACKGROUND

On or about December 5, 2001, Tour2000, which claims to be the fifth largest travel agency in the Republic of Korea, contacted Defendant/Cross-Claim Defendant/Appellee Koreana Tour Service, Inc. (Koreana), a Hawai'i travel agency whose president was Defendant/Cross-Claim Defendant/Appellee Tae Sik Ha (Ha), to arrange for hotel accommodations for three nights at the Hilton Hawaiian Village (Hilton) in Waikiki and one night at the Mauna Kea Beach Hotel (Mauna Kea or Hotel) in Kamuela for a group of four individuals (clients) associated with the Yong-In Songdam College (College).

Ha contacted Kim, a sales manager at the Hawaii Prince Hotel in Waikiki, a sister hotel of the Mauna Kea, to obtain a quote for the Mauna Kea. Subsequently, Ha informed Tour2000 that the rate for the Hilton was \$434.00 per room per night and the rate for the Mauna Kea was \$320.00 per room per night. Tour2000 paid Koreana, on behalf of the clients, \$4,496.00 for the entire trip, \$1,736.00 of which was attributed to the stay at the Mauna Kea. Tour2000 received a receipt for this payment on December 6, 2001.

On December 8, 2001, as the clients were checking out of the Mauna Kea, they were told that they had to pay for their rooms because the Mauna Kea had not received any payment for their stay. Each client was then charged \$250.85 for his or her room, although the charges were reversed by the Mauna Kea the next day. After returning to Korea, the clients complained to Tour2000 that they were cheated and demanded that they be refunded the difference between the \$250.85 actual charge and the amount they had paid for their rooms.

Choe Wan Hui (Hui), foreign markets manager of Tour2000, then contacted Ha, who assured Hui that the front-desk agent at the Mauna Kea had simply made a mistake and should have charged the clients \$434.00 per night, the rate Koreana had quoted Tour2000. In support of his explanation, Ha faxed to Hui

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a copy of an invoice from the "Maunakea [sic] Beach Hotel" dated December 4, 2001, which stated, in relevant part, that Koreana had been sold the following:

QUANTITY	DESCRIPTION	UNIT PRICE	AMOUNT
4	MAUNAKEA BEACH HOTEL	434.00	\$1,736.00
		SUBTOTAL	1,736.00
		TAX	
		FREIGHT	
MAKE ALL CHECKS PAYABLE TO: KOREANA TOUR SERVICE			\$1,736.00 PAY THIS AMOUNT

The invoice was stamped "Paid" and initialed.³ Ha also faxed to Hui a copy of a December 4, 2001 check for \$1,736.00, allegedly from Koreana, made payable to the "Maunakea [(sic)] Beach Hotel[,]" and a copy of two letters of apology: (1) an unsigned copy of a December 20, 2001 letter to Ha from Bryan Lynx (Lynx), the director of sales and marketing for the Mauna Kea, which indicated thereon that a copy of the letter had gone to Kim, apologizing for the Mauna Kea's mistake in requiring the clients to pay with their own credit cards (Lynx letter); and (2) an unsigned copy of a December 20, 2001 letter to all four clients from a front-desk agent for the Mauna Kea, apologizing for her mistake in charging their credit cards and for any inconvenience she may have caused them (collectively, apology letters). At the top of the faxed copy of the Lynx letter was a fax post-it note, which suggested that the copy of the Lynx letter that Ha had faxed to Hui had previously been faxed by Kim to Ha.

Upon receiving the information and explanation from Ha, Tour2000 officials questioned the authenticity of the invoice after noticing that Hotel's name was misspelled, Hotel's address was misstated, and the instructions at the bottom required payment to be made to Koreana, rather than to Mauna Kea.

³ The initials are indecipherable.

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Tour2000 officials were also suspicious because Koreana's check and the invoice were both dated December 4, 2001, and the unsigned apology letters only referred to the charging of the clients' credit cards and not the overcharging of the clients. Tour2000 therefore contacted Lynx, who investigated the matter.

In a January 16, 2002 letter to the president of Tour2000, Lynx shared the results of his investigation:

First of all, the rate extended to all four rooms was a rate quoted by my office on 12/3/01 -- a room rate of \$225 plus taxes (11.41%) which equated to \$250.68 per room per night. I extended this rate to our corporate office in Honolulu, who in turn informed [Koreana] of the rate. [Koreana] advised our corporate office that they would pre-pay room and tax.

A check in the amount of \$1002.80 was written by [Koreana] on 12/5/02 and the check was made payable to Hawaii Prince Hotel, our sister hotel in Honolulu. Due to the check being made payable to them and not the [Mauna Kea], we could not cash the check or apply it against the rooms as a deposit. Instead, an interoffice payment was applied to [Mauna Kea] and we received that in the last few days.

When the guests checked out of the hotel, they demanded that a credit be given their account because they were unhappy with the accommodations. We placed a credit of \$250.68 on 4 rooms and applied that credit to [one of the client's] personal credit card in the amount of \$1002.80.

No check for the amount of \$1736.00 was received or applied to any account here at the hotel and no charge of \$434.00 per room was ever made by us.

I am attaching all of our documentation for your review in the hope that you will realize that our company had done nothing inappropriate whatsoever and has not attempted to deceive the client or [Koreana].

We value all of our guests at the [Mauna Kea] and while we can understand the clients are upset, based on the account of events in your letter, we cannot understand this situation and suggest that you further inquire with [Koreana] to help clarify it for all of us.

Please let me know if I can be of further assistance in this matter. I am most anxious to resolve the issue and establish a good working relationship between our three companies.

Attached to Lynx's letter were copies of (1) a Reservation Request for the clients, dated December 3, 2001, for four separate rooms at a rate of \$225.00 each, with an arrival date of

December 7, 2001 and a departure date of December 8, 2001; (2) a check for \$1,002.80 from Koreana to the Hawaii Prince Hotel, dated December 5, 2001; and (3) the respective clients' guest folios, showing that the amounts that had been previously charged to the clients for the four rooms had been credited back to the credit card used to pay for the charges.

On March 14, 2002, Charles Park (Park), the general manager of the Mauna Kea, also wrote a letter to the president of Tour2000, apologizing "that the problem still exists" and "for any negative feelings." In the letter, Park stated:

[I]t is my understanding that our sister property, The Hawaii Prince Hotel initiated the reservation for the [clients]. The total amount for the room reservations was \$1002.72. This is the amount [Koreana] paid Hawaii Prince Hotel on December 5, 2001; the amount [one of the client's] credit card was charged on December 7 and subsequently refunded on December 8. It is the amount we invoiced [Koreana] on December 11 and the same amount we received via inter-company billing on December 17.

I believe that this information is correct and accurate, and I can only surmise that a check in an amount other than this amount must be some kind of clerical error. I believe that we would all like to put the matter "to rest" and get on with the business of providing our clients from Tour2000, [Koreana] and [Mauna Kea] with the best possible Hawaiian vacations.

PROCEDURAL HISTORY

On August 11, 2003, Tour2000 filed its complaint against Koreana, Ha, and Kim, alleging the following counts:

- I. fraud and deceit--against Koreana and Ha;
- II. conspiracy to defraud--against Koreana, Ha, and Kim;
- III. unfair and deceptive acts and practices--against Koreana, Ha, and Kim;
- IV. interference with contractual relations--against Koreana, Ha, and Kim; and
- V. a prayer for punitive damages--against Koreana, Ha, and Kim.

Tour2000 claimed, in relevant part, that (1) "[i]n the Republic of Korea, reputation is everything in business"; (2) upon returning to Korea, the clients submitted a letter to Tour2000 stating that they could no longer trust Tour2000; (3) the College "now conducts student body travels through other travel agencies" and "Tour2000's relationship with the College and its Dean has been ruined"; (4) "[l]osing face throughout the Seoul business community as a result has severely impacted Tour2000's growth, causing it to lose tens of millions of dollars in travel business"; (5) Tour2000 refunded to the clients their overcharges for the Mauna Kea stay "to attempt to keep its reputation from further deteriorating, to no avail"; (6) "[r]esearch discloses that in fact the standard room rate for a mountain view at the [Mauna Kea] to this day is the same as that actually charged [sic] Tour2000's clients in December 2001: \$225.00 plus tax"; (7) in June 2002, the manager of the Pyungtek branch of Tour2000⁴ directly confronted Ha, who allegedly responded that the manager "was not 'wise' to the way things are done in business in the United States, that in the United States he was free to charge whatever he wanted to and practice business however he wanted to, that he had to split his profits with the 'person' who secured the rate for him, for which reason he had to charge more, almost double, asking that the matter be dropped as we were 'all Koreans'"; (8) "[i]t is believed that this type of deceptive practice is widespread and frequent, and that the Korean community is especially being taken advantage of by sales personnel at Hawaii Hotels who are sandwiching themselves in between their employers and their hotel guests, skimming off millions of dollars from unsuspecting foreign tourists paying

⁴ In its Settlement Conference Statement filed on March 22, 2006, Tour2000 did not identify as a trial witness any individual who was identified as the manager of the Pyungtek branch of Tour2000. Subsequently, in a declaration attached to Tour2000's memorandum in opposition to Kim's motion for summary judgment, Hui, who stated that she was the foreign markets manager of Tour2000, attested that the statement by Ha was made to her.

much higher room rates through dishonest intermediaries such as Koreana, with the connivance of improperly supervised hotel sales personnel"; and (9) "[a]s a result of all this, Tour2000 has suffered growing community disdain, personal and business embarrassment, trade defamation, and loss of business income and profits, for which Tour2000 seeks compensation for its actual and projected losses in the amount of \$5,000,000.00 U.S., or more, according to its proof at trial."

Koreana and Ha did not answer Tour2000's complaint, and on April 26, 2004, default was entered against Koreana and Ha with respect to Tour2000's complaint.

Kim answered Tour2000's complaint and filed cross-claims for indemnification and contribution against Koreana and Ha. On May 14, 2004, default was entered against Koreana and Ha with respect to Kim's cross-claims.

On March 6, 2006, Kim filed her first "Motion for Summary Judgment and for HRCP Rule 54([b]) Certification of a Final Judgment and for Costs" (first motion for summary judgment). In an attached declaration, Kim stated:

2. Since November 1999, I have been a Sales Manager, employed by the Hawaii Prince Hotel Waikiki.

3. As a Sales Manager, I receive a monthly salary.

4. I do not receive any commission whatsoever from any reservations that I process on behalf of the Hawaii Prince Hotel Waikiki or its affiliated hotels, which includes the Mauna Kea Beach Hotel.

5. I have never received any money from any travel agent or travel agency, including Koreana or [Ha] in connection with any reservation that I processed on behalf of the Hawaii Prince Hotel Waikiki or its affiliated hotels, which includes the Mauna Kea Beach Hotel.

6. I was not and have not been involved with any part of the business of [Koreana] or [Ha].

7. I have never received any money from Koreana or [Ha] in connection with any reservation that I processed, including the reservations relating to [the clients].

8. In my capacity as Sales Manager, I handled a reservation for the [Mauna Kea] made by [Ha] on behalf of Koreana with respect to [the clients] in December 2001.

9. I made reservations for [the clients], consisting of four (4) rooms for one night at the rate of \$225.00 plus tax, which amounted to \$250.68 per room. See attached Exhibit A, which is Exhibit 5 attached to [Tour2000's] Complaint filed herein on August 11, 2003.

10. Koreana issued a check in the amount of \$1002.80 for the reservations for [the clients] at the [Mauna Kea]. See attached Exhibit B, which is Exhibit 6 attached to [Tour2000's] Complaint filed herein on August 11, 2003.

11. All the rates and charges and documentation I generated are in order.

12. I have no knowledge that Koreana or [Ha] charged [the clients] \$434.00 per room until sometime after [the clients] complained that they were charged \$434.00 by Koreana when the actual [Mauna Kea] rate was \$225.00 plus tax.

13. [Tour2000's] dispute relates solely to what [Ha] told them and the documents generated by Koreana.

14. As such [Tour2000's] claim is solely with Koreana and [Ha], not with me.

Kim argued, as to Count II (conspiracy to defraud), that Tour2000 had produced absolutely no credible and admissible evidence that she had knowing involvement with the fraudulent scheme carried out by Koreana and Ha. As to Count III (unfair and deceptive trade practices), Kim argued that "there is absolutely no evidence that [her] actions were unfair or deceptive in any way. . . . [She] had no knowledge of or involvement in the alleged misrepresentations made by Koreana to Tour2000." As to Count IV (interference with contractual relations), Kim argued that

there is no evidence whatsoever that [she] intentionally or willfully interfered with [Tour2000's] contractual relations. In fact, . . . there is absolutely no evidence that [she] had any knowledge of Koreana's alleged scheme to overcharge [Tour2000]. Without any knowledge, [she] cannot be held responsible for the actions of Koreana in overcharging Tour2000 and its clients and the subsequent fallout that [Tour2000] claims to have suffered."

(Citations omitted.) As to Count V (punitive damages), Kim argued that "there is no evidence in the record -- much less clear and convincing evidence -- that [she] acted 'wantonly or oppressively or with such malice as implies a spirit of mischief or criminal indifference to civil obligations.'" As such, Kim

argued, there were no genuine issues of material fact and she was entitled to summary judgment as a matter of law.

Tour2000 responded that summary judgment was unwarranted because it was Kim's burden to establish that there was no genuine issue of material fact, and Kim did not meet this burden because (1) she was the "go-between agent" between Koreana, Ha and the Mauna Kea; (2) Tour2000 was defrauded and overcharged, and then the fraud was covered up by falsified documents; and (3) Kim's handwriting was on a post-it note attached to a document which was drafted as part of the coverup. Tour2000 further asserted that Kim had acted in bad faith by

ignoring repeated requests to take her oral deposition starting in early 2004, then claiming that she was out of town, then claiming that her counsel was out of town, and then offering a sworn Declaration from her, which took more than a year to produce to [Tour2000's] counsel after first being promised to [Tour2000] and to the Court in 2004."

On April 12, 2006, the circuit court issued its order granting in part and denying in part Kim's first motion for summary judgment. The circuit court granted, without prejudice, Kim's motion with respect to Count IV (custodial interference with contractual relations), but denied summary judgment as to Counts II, III, and V. The circuit court also denied Kim's motion for HRCP Rule 54(b) certification of a final judgment and for costs.

On July 21, 2006, Kim filed her second "Motion for Summary Judgment as to All Counts of the Complaint and for Rule 54([b]) Certification of Final Judgment and Costs" (second motion for summary judgment). In a memorandum in support of this motion, Kim argued that (1) Tour2000 did not have standing as a "consumer" to assert an unfair or deceptive practices claim; (2) summary judgment is appropriate as to the conspiracy-to-defraud claim because Ha's statement that Kim was involved is insufficient to establish the existence of a conspiracy and there is no evidence showing an illegal agreement between Kim and

Koreana; and (3) there is no evidence of wanton, oppressive, or malicious conduct that would serve as a basis for punitive damages.

In a declaration filed with her second motion for summary judgment, Kim reiterated that she did not receive any money from Koreana or Ha in conjunction with any reservation she processed. Kim acknowledged that in her capacity as sales manager, she handled a reservation for the Mauna Kea made by Ha on behalf of Koreana for the clients. Kim stated that she quoted Koreana the rate of \$225.00 plus tax, per room per night; received a check from Koreana for \$1,002.80 based on the quoted rate, made payable to the Hawaii Prince Hotel Waikiki; and forwarded the check to the accounting department of the Hawaii Prince Hotel Waikiki. She then "caused the Hawaii Prince Hotel Waikiki to deposit the \$1002.80 via interoffice credit to the [Mauna Kea]."

On August 7, 2006, Tour2000 filed its memorandum in opposition to Kim's second motion for summary judgment. Tour2000 argued that no new evidence had been adduced since the denial of Kim's first motion for summary judgment and, therefore, there was no basis to grant summary judgment. Tour2000 further argued that it had standing to bring a claim for unfair or deceptive practices because a party does not have to be a "natural consumer" in order to have standing.

On September 11, 2006, the court filed its "Findings of Fact, Conclusions of Law and Order Granting [Kim's] Motion for Summary Judgment as to Counts II, III, and V of [Tour2000's] Complaint[.]" The court determined that summary judgment was proper and made the following relevant findings:

8. Koreana made hotel room reservations through [Kim], a sales manager at the Hawai'i Prince Hotel in Waikiki.
9. [Kim] secured rooms for Koreana at the rate of Two Hundred Twenty Five Dollars (\$225.00) plus tax, per room, per night. The total for the four (4) rooms was One Thousand Two Dollars and Eighty Cents (\$1,002.80).

10. On December 5, 2001, Koreana forwarded a check in the amount of One Thousand Two Dollars and Eighty Cents (\$1,002.80) to Defendant Lee Kim who in turn submitted the check to accounting at the Hawai'i Prince Hotel in Waikiki and submitted a copy of the reservation and check to the [Mauna Kea].

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29. [Kim] has presented evidence to show that, other than making the reservation for the four (4) rooms at Two Hundred Twenty Five Dollars (\$225.00) per night, she had nothing to do with Koreana's actions to inflate the room rate given to Tour 2000 [sic].

There is no evidence that:

- a. She received any benefit from Koreana or Defendant Ha.
- b. She had knowledge prior to the Complaint about the inflated room rate.
- c. She participated in the false invoice or representations.

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31. In support of its motion, [Tour2000] attempts to admit the hearsay statement allegedly made by [Ha] to [Hui] of Tour2000, as a co-conspirator statement under Hawai'i Rules of Evidence [(HRE) Rule] 803(A)(2)(c), to support its conspiracy.

32. Specifically, Tour2000 relies on the declaration of [Hui] who stated that in a conversation with [Ha], who stated[] "he had split this profit with the person who he had secured the rate from."

33. Tour2000 claims that [Ha's] alleged statement to [Hui] implicates [Kim] directly in the alleged conspiracy.

34. The Court finds there was not reference of [Kim's] name and that [Ha's] statement generally talked about his opinion on how business is done in Hawai'i. There was no inference or reference to the fact that this was actually done in this particular case.

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39. Even assuming, *arguendo*, that [Kim] did share profits from the Tour2000-Koreana contract, profit sharing by itself is not evidence of conspiracy.

40. The Court finds that the statement by [Ha] was not made during the course and in the furtherance of the conspiracy. It was made when [Ha] was confronted by [Hui] after discovery of this fraudulent billing.

41. Therefore, if there was any conspiracy, the conspiracy at that point had ended and any statements thereafter was [sic] not made in furtherance of the conspiracy.

42. Therefore, the Court finds that [Ha's] statement to [Hui] is inadmissible hearsay under the [HRE].
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51. In this case, [regarding the claim of Unfair or Deceptive Acts and Practices,] Tour2000 does not constitute a consumer. Therefore, summary judgment is granted as to Court [sic] III.
52. . . . As to Count V, [punitive damages,] it is clear based on the court's previous rulings that Summary Judgment is also granted on punitive damages in light of the fact that there is no evidence to show that [Kim] had conspired or had anything to do with the fraudulent over billing [sic] or overpricing of rooms for Tour2000.

(Some ellipsis omitted.)

On October 11, 2006, Tour2000 filed its notice of appeal.

ISSUES ON APPEAL

Tour2000 claims that the circuit court erred in granting summary judgment in Kim's favor because (1) genuine issues of material fact existed as to whether Kim was part of Koreana and Ha's fraud and subsequent cover-up, and (2) the circuit court wrongly concluded that Hawaii Revised Statutes (HRS) chapter 480 did not apply to Tour2000 because Tour2000 was not a consumer or a natural person.

STANDARDS OF REVIEW

An appellate court reviews a grant of summary judgment under the *de novo* standard of review. Hawaii Cmty. Fed. Credit Union v. Keka, 94 Hawai'i 213, 221, 11 P.3d 1, 9 (2000).

The standard for granting a motion for summary judgment is settled:

[S]ummary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. 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. The evidence must be viewed in the light most favorable to the non-moving party. In other words, we must view all of the evidence and the

inferences drawn therefrom in the light most favorable to the party opposing the motion.

Querubin v. Thomas, 107 Hawai'i 48, 56, 109 P.3d 689, 697 (2005) (quoting Durette v. Aloha Plastic Recycling, Inc., 105 Hawai'i 490, 501, 100 P.3d 60, 71 (2004)). According to the Hawai'i Supreme Court, the following well-settled legal principles govern motions for summary judgment:

[a] summary judgment motion challenges the very existence or legal sufficiency of the claim or defense to which it is addressed. In effect the moving party takes the position that he or she is entitled to prevail because his or her opponent has no valid claim for relief or defense to the action. Accordingly, the moving party has the initial burden of identifying those portions of the record demonstrating the absence of a genuine issue of material fact. The moving party may discharge his or her burden by demonstrating that, if the case went to trial, there would be no competent evidence to support a judgment for his or her opponent. Cf. Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986) (a party moving for summary judgment under Federal Rules of Civil Procedure Rule 56 need not support his or her motion with affidavits or similar materials that negate his or her opponent's claims, but need only point out that there is an absence of evidence to support the opponent's claims). For if no evidence could be mustered to sustain the nonmoving party's position, a trial would be useless.

When a motion for summary judgment is made and supported,

an adverse party may not rest upon the mere allegations or denials of his or her pleading, but his or her response, by affidavits or as otherwise provided in HRCP Rule 56, must set forth *specific facts showing that there is a genuine issue for trial*. If he or she does not so respond, summary judgment, if appropriate, shall be entered against him or her.

HRCP Rule 56(e) (1998) (emphasis added). In other words, a party opposing a motion for summary judgment cannot discharge his or her burden by alleging conclusions, nor is he or she entitled to a trial on the basis of a hope that he can produce some evidence at that time. On motion for summary judgment, the evidence is viewed in the light most favorable to the non-moving party.

Moreover, the evidentiary standard required of a moving party in meeting its burden on a summary judgment motion depends on whether the moving party will have the burden of

proof on the issue at trial. Where the moving party is the defendant, who does not bear the ultimate burden of proof at trial, *summary judgment is proper when the non-moving party-plaintiff*

fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be no genuine issue as to any material fact, since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is entitled to judgment as a matter of law because the nonmoving party has failed to make a sufficient showing on an essential element of [his or] her case with respect to which [he or] she has the burden of proof.

Exotics Hawaii v. E.I. Du Pont de Nemours, 116 Hawai'i 277, 301-02, 172 P.3d 1021, 1046 (2007) (emphases in original; citations, internal quotation marks, brackets, and ellipses omitted). Additionally, where a defendant moves for summary judgment and produces material in support of an affirmative defense on which the defendant will have the burden of proof at trial, the plaintiff is obligated to produce admissible evidence to disprove the affirmative defense in order to avoid the grant of summary judgment in the defendant's favor. GECC Fin. Corp. v. Jaffarian, 80 Hawai'i 118, 119, 905 P.2d 624, 625 (1995) (agreeing with the concurring opinion in GECC Fin. Corp. v. Jaffarian, 79 Hawai'i 516, 904 P.2d 530 (App. 1995), that a plaintiff moving for summary judgment "should be *obligated* to disprove an affirmative defense in moving for summary judgment, when, but only when, the defense produces material in support of an affirmative defense").

Reviewing the grant of a motion for summary judgment involves a three-step analysis. Pioneer Mill Co. v. Dow, 90 Hawai'i 289, 296, 978 P.2d 727, 734 (1999).

First, we identify the issues framed by the pleadings since it is these allegations to which the motion must respond.

. . . .

Secondly, we determine whether the moving party's showing has established facts which negate the opponent's

claim and justify a judgment in movant's favor. *The motion must stand self-sufficient and cannot succeed because the opposition is weak.*

When a summary judgment motion prima facie justifies a judgment, the third and final step is to determine whether the opposition demonstrates the existence of a triable, material factual issue. Counter-affidavits and declarations need not prove the opposition's case; they suffice if they disclose the existence of a triable issue.

Id. at 296, 978 P.2d at 734 (emphasis in original; footnote omitted).

We examine the order granting summary judgment in favor of Kim according to the foregoing analytical framework.

DISCUSSION

A. The Conspiracy-to-Defraud Count

In Count II of the complaint, Tour2000 alleged that (1) Kim "aided and abetted" Koreana and Ha in their "misrepresentations and concealments and lies and cover-ups" [sic] and "conspired with Koreana and with Ha to defraud Tour2000 and its clients"; (2) "Tour2000 reasonably relied to its detriment upon the aforesaid misrepresentations and concealments and lies and cover-ups [sic], each and all, made to Tour2000 by Koreana and by Ha, aided and abetted by Kim . . . , with the knowledge of all such conspirators that Tour2000's clients were being cheated and should they discover same that they would blame Tour2000 and cease doing business with Tour2000"; and (3) "[a]s a result of said conspiracy to defraud, Tour2000 is entitled to all of its actual damages against Koreana, Ha, and Kim in the amount of \$5,000,000.00 or more, the actual amount to be determined according to its proof at trial, including reimbursement for all of its resulting losses, including prejudgment interest, attorney's fees, and court costs."

The Hawai'i Supreme Court has explained that "[c]ivil conspiracy does not alone constitute a claim for relief. Robert's Hawaii School Bus, Inc. v. Laupahoehoe Transp. Co., 91 Hawai'i 224, 260 n.44, 982 P.2d 853, 889 n.44 (1999). Additionally, "mere acquiescence or knowledge is insufficient to

constitute a conspiracy, absent approval, cooperation, or agreement." Id.

With respect to the elements of civil fraud, the supreme court has stated that

the evidence must be clear and convincing to support a finding of fraud. The evidence must show that (1) false representations were made by defendants, (2) with knowledge of their falsity (or without knowledge of their truth or falsity), (3) in contemplation of plaintiff's reliance upon these false representations, and (4) plaintiff did rely upon them. Further, plaintiff must show that he [or she] suffered substantial pecuniary damage for the aim of compensation in deceit cases is to put the plaintiff in the position he would have been had he not been defrauded.

Shanghai Inv. Co. v. Alteka Co., 92 Hawai'i 482, 497, 993 P.2d 516, 531 (2000) (formatting altered; citations, internal quotation marks, and brackets omitted).

In her motion for summary judgment, Kim produced evidence that negated Tour2000's conspiracy-to-defraud claim. Specifically, Kim submitted her declaration that (1) she did not receive any commission, money, or other benefit from Koreana or Ha in connection with any reservations she processed on behalf of the Hawaii Prince Hotel; (2) she was not involved with any aspect of Koreana and Ha's business; (3) she booked reservations for four rooms at the Mauna Kea for the clients at a nightly rate of \$225.00 plus tax and received a check from Koreana, made payable to the Hawaii Prince Hotel, for the total (\$1,002.80), which she then deposited and transmitted to the Mauna Kea; and (4) she had no knowledge until after the complaint was filed that Koreana or Ha had charged Tour2000 more for the rooms than the quoted price. Kim also argued that Tour2000 had produced absolutely no credible or admissible evidence of her knowing involvement with the fraudulent scheme carried out by Koreana and Ha.

Tour2000 argues on appeal that the circuit court erred in granting summary judgment in Kim's favor as to Count II because genuine issues of material fact existed as to whether Kim had conspired with Koreana and/or Ha to defraud Tour2000.

Tour2000 asserts that the following evidence demonstrated that a conspiracy to defraud existed: (1) the post-it note in Kim's handwriting which was attached to the December 20, 2001 Lynx letter; (2) Kim's "belated, skimpy, conclusionary Declaration"; (3) the reliability of Lynx's declaration; (4) the front-desk agent's apology letter; and (5) Hui's declaration that she was told by Ha that he had to "split his profit with the person who [sic] he had secured the rate from."

We disagree with Tour2000. Our review of the record reveals that Tour2000 adduced absolutely no admissible evidence that Kim had conspired with Koreana and Ha to commit fraud against Tour2000. As the circuit court correctly concluded, Ha's alleged statement to Hui was inadmissible hearsay under HRE Rule 802 (1993). The statement was not, as Tour2000 urges, a co-conspirator's statement that was admissible pursuant to HRE Rule 803(a)(2)(C) (1993)⁵ because the statement was not made "during the course and in furtherance of the conspiracy" but in response to Hui's confrontation of Ha after discovering that Koreana had charged Tour2000 more than the price quoted by Kim for the Mauna Kea rooms. Additionally, we fail to see how copies of the apology letters and post-it note provide any evidence of a conspiracy by Kim to defraud Tour2000. On their face, the letters apologize only for charging the clients' credit cards for the rooms at the Mauna Kea and not for the amount that clients

⁵ HRE Rule 803(a) provides, in relevant part, as follows:

Hearsay exceptions; availability of declarant immaterial. The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(a) Admissions.

. . . .

(2) Vicarious admissions. A statement that is offered against a party and was uttered by . . .
(C) a co-conspirator of the party during the course and in furtherance of the conspiracy.

were charged. Tour2000 questions the authenticity of the letters because they are not on letterhead paper and are not signed. However, Lynx and the front-desk agent both confirmed that they had written and sent the original letters of apology.

B. The Unfair-and-Deceptive-Acts-or-Practices Count

In Count III of its complaint, Tour2000 alleged:

45. Said deceptive and fraudulent conduct by Koreana, Ha, Kim, and yet unnamed Does constitute unfair and deceptive business acts and practices proscribed by Chapter 480 of the [HRS], as offensive to established public policy and immoral, unethical, oppressive, unscrupulous, and substantially injurious practices as to Tour2000, their clients, and as to others similarly situated.

46. Tour2000 therefore is entitled to an award of its actual damages in the amount of \$5,000,000.00 or more, the actual amount to be determined according to its proof at trial, trebled to \$15,000,000.00 or more, pursuant to Section 480-13 of the [HRS], together with its attorney's fees and court costs.

At the time Tour2000 filed its lawsuit, HRS § 480-2 (1993) provided 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.

. . . .

(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.

(Emphasis added.) The plain language of HRS § 480-2(d) provides that actions based upon unfair or deceptive acts or practices may only be brought by consumers, the attorney general, or the director of the office of consumer protection. "Consumer" is defined in HRS § 480-1 (2008)⁶ as "a natural person who, primarily for personal, family, or household purposes, purchases, attempts to purchase, or is solicited to purchase goods or

⁶ The current definition of the word "consumer" has not changed since Tour2000 brought the underlying action.

services or who commits money, property, or services in a personal investment." Therefore, business entities are precluded from bringing an action under HRS § 480-2 based on a claim of unfair or deceptive acts or practices. Ass'n of Apartment Owners of Newtown Meadows v. Venture 15, Inc., 115 Hawai'i 232, 252, 167 P.3d 225, 245 (2007) (holding that an unincorporated association is not a natural person, is not a consumer, and does not have standing to bring an action based upon unfair or deceptive acts or practices); Joy A. McElroy, MD, Inc. v. Maryl Group, Inc., 107 Hawai'i 423, 435, 114 P.3d 929, 941 (App. 2005) (holding that a corporation does not have standing to bring an action based on unfair or deceptive acts or practices because it is not a natural person).

Tour2000 is a business entity and does not claim that it is a natural person. Indeed, in its complaint, Tour2000 alleged that it "is one of the largest travel agencies in the Republic of Korea[.]" As such, Tour2000 did not have standing to bring an unfair-or-deceptive-acts-or-practices claim under HRS § 480-2, and the circuit court correctly entered summary judgment in Kim's favor on Count III.

Tour2000 did not allege a claim based upon unfair methods of competition in its complaint. Nevertheless, in its memorandum in opposition to Kim's second motion for summary judgment, Tour2000 argued:

While [Kim's] counsel is correct in that Section 480-2(d) has, for instance, been interpreted to place a "consumer" standing limitation partially on Chapter 480 claims, the case law, to the contrary, specifically allows commercial suits nevertheless pursuant to Chapter 480, and the cases have so construed Section 480-2 as inapplicable, as far as its "consumer" limitation is concerned, with respect to commercial "unfair methods of competition" claims.

Here, [Tour2000], as a travel agency, was in effect competing for bookings with [Kim] who it is contended was rigging Hotel prices in conjunction with Koreana and [Ha], entitling [Tour2000] to sue for unfair competition, Kukui Nuts of Hawaii, Inc. v. R. Baird & Co., Inc., [7 Haw.App. 598, 789 P.2d 501, *cert denied*, 71 Haw. 668, 833 P.2d 900 (1990)] ("prevent fraudulent, unfair or deceptive practices

for the protection of both consumers and honest business men," quoting approvingly from *Ai v. Frank Huff Agency, Ltd.*, 61 Haw. 607, 616, 607 P.2d 1304, 1311 (1980)".

Because a motion for summary judgment must respond to the issues framed by the pleadings, Pioneer Mill Co. v. Dow, 90 Hawai'i at 296, 978 P.2d at 734, and Tour2000 did not allege a claim for unfair methods of competition in its complaint, the circuit court properly did not consider this belatedly raised claim in deciding Kim's second motion for summary judgment. Furthermore, the statutory cause of action for unfair methods of competition was created by 2002 Haw. Sess. Laws Act 229, § 2 at 915, after the underlying lawsuit had been filed, and the Hawai'i Supreme Court has held that private persons are permitted to bring a claim for only those acts of unfair methods of competition that were committed after June 28, 2002, the effective date of Act 229. Hawaii Med. Ass'n v. Hawaii Med. Serv. Ass'n, 113 Hawai'i 77, 107, 148 P.3d 1179, 1209 (2006) ("The 2002 amendment [to HRS § 480-2] clearly created a private claim for relief for unfair methods of competition for claims arising after the June 28, 2002 effective date. Neither the language of the statute itself nor the legislative history of the amendment give [sic] any expressed indication that the amendment should be applied retroactively.").

In the present case, the event giving rise to this action occurred between December 5, 2001 and December 8, 2001. These events occurred prior to the June 28, 2002 effective date of the amendment that created a private cause of action for claims based upon unfair methods of competition. As such, Tour2000 did not have standing to make such a claim.

CONCLUSION

It is undisputed in this case that Koreana and Ha, against whom default has been entered, charged Tour2000 \$733.20 more than the cost quoted by Kim for four hotel rooms at the Mauna Kea for one night. For the past seven years, Tour2000 has sought millions of dollars in damages from Kim, through whom

Koreana booked reservations at the Mauna Kea for Tour2000, claiming that she conspired with Koreaana and Ha to defraud Tour2000's clients and engaged in unfair and deceptive acts or practices against Tour2000. Based on our review of the record, we conclude that the circuit court correctly granted summary judgment in favor of Kim and against Tour2000. Accordingly, we affirm (1) the HRCP Rule 54(b) certified final judgment in favor of Kim, entered by the circuit court on September 11, 2006; and (2) the "Findings of Fact, Conclusions of Law and Order Granting [Kim's] Motion for Summary Judgment as to Counts II, III, and V of [Tour2000's] Complaint[.]"

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