

DISSENTING OPINION BY ACOBA, J.

I would vacate the judgment dismissing the complaint and remand the case to permit Plaintiff-Appellant Emerson M.F. Jou, M.D. (Jou) to file an amended complaint. By virtue of Hawai'i Rules of Civil Procedure (HRCPP) Rule 15(a),<sup>1</sup> Jou was entitled to amend his complaint once as a matter of course before a responsive pleading was served. The motion to dismiss filed by Defendant-Appellee First Insurance Company of Hawai'i, Ltd. (Defendant) is not a responsive pleading. Ellis v. Crockett, 51 Haw. 45, 60, 451 P.2d 814, 824 (1969) ("We hold that the appellants were entitled to file an amended complaint as a matter of right. [HRCPP] Rule 15(a) provides that 'a party may amend his pleading once as a matter of course at any time before a responsive pleading is served \* \* \* .' As the defendants admit, a motion to dismiss is not a 'responsive pleading' within the meaning of the rule.").

Moreover,

[i]n appraising the sufficiency of the complaint under Rule 12(b)(6), the accepted rule is that well-pleaded allegations of fact are taken as admitted and the complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. . . . "The motion to dismiss for failure to state a claim is viewed with disfavor and is rarely granted."

Marsland v. Pang, 5 Haw. App. 463, 474, 701 P.2d 175, 185-86 (1985) (emphasis added) (citations omitted). HRCPP Rule 8(a)(1)

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<sup>1</sup> HRCPP Rule 15(a) states in relevant part that "[a] party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served[.]"

states in part that "[a] pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief[.]" As Defendant indicates, quoting from Marsland, to satisfy HRCF Rule 8(a)(1), "the complaint must contain either direct allegations on every material point necessary to sustain a recovery on any legal theory, even though it may not be the theory suggested or intended by the pleader, or contain allegations from which an inference fairly may be drawn that evidence on these material points will be introduced at trial." Id. at 475, 701 P.2d at 186 (emphasis added). HRCF Rule 8(f) also mandates that "[a]ll pleadings shall be so construed as to do substantial justice." (Emphasis added.)

In his August 28, 2003 opposition to Defendant's motion to dismiss, Jou proffered a proposed amended complaint. The amended complaint alleged in pertinent part that

7. Sometime prior to December 19, 2002, Defendant caused false information about Plaintiff to be placed in; or, to remain in credit and real estate reporting systems.
8. On April 11, 2002, Defendant was found by a jury to be liable to Plaintiff for abuse of process as a result of information left in credit and real estate reporting systems, at a time when the information was false. . . . Defendant FICOH contended at trial that it had cured the damaging entries in the reporting system by filing certain documents.
9. About one year after the jury's finding, Plaintiff was denied credit as a legal and proximate result of republication or retransmission of the information Defendant had placed in the credit and real estate reporting systems. Afterward, FICOH filed a "Release of Notice Of Entry Of Judgment" which was recorded on December 23, 2002. A copy thereof is attached as Exhibit "A". This document was recorded after Dr. Jou was denied a real estate loan.
11. After June 13, 2002, there existed a prospective advantage, expectancy, or business relationship sufficiently definite, specific, and capable of acceptance by a real estate lender; in the sense that there was a reasonable probability of it

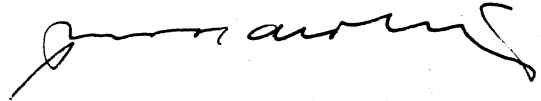
maturing into a future economic benefit to the Plaintiff.

(Emphases added.) (Boldfaced font omitted.) While Plaintiff refers to his first cause of action as interference with a business relationship, the complaint also sounds as an action for fraud, although it is not the theory suggested or intended by Jou. Marsland, 5 Haw. App. at 474, 701 P.2d at 185-86.

Paragraph 8 of the amended complaint alleges that Defendant contended at a prior trial in April 2002 that it had cured the subject damaging entry by filing certain documents. However, the amended complaint indicates that despite Defendant's contention at trial that it had cured the damaging entries by filing certain documents, the apparent "cure" document entitled "Release of Notice of Entries of Judgment" was not recorded until December 23, 2002. In this regard, "[HRCP] Rule 60(b) provides that a court may entertain an independent action to relieve a party from a judgment because of a fraud upon the court." Ellis, 51 Haw. at 59, 451 P.2d at 823. See also, Matsuura v. E.I. Du Pont De Nemours & Co., 102 Hawai'i 149, 162, 73 P.3d 687, 700 (2003) (holding that a subsequent independent action for fraud based upon litigation misconduct in a prior related action is allowable in Hawai'i). Inasmuch as the amended complaint sounds in an action for fraud based on representations in the April 2002 trial itself, neither res judicata nor collateral estoppel that are relied on by the majority would preclude such an action.

For the foregoing reasons, and construing the pleadings "to do substantial justice," HRCP Rule 8(f), "[t]he trial court

erred in refusing to permit the complaint to be amended and [I would], therefore, remand the case to permit the amendment[," Ellis, 51 Haw. at 59, 451 P.2d at 823, and vacate the court's judgment dismissing the case.

A handwritten signature in black ink, appearing to read "J. M. ...", is written in a cursive style across the middle of the page.