***** NOT FOR PUBLICATION *****

NO. 26485

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

LLOYD UCKO; NANCY SCHOOCRAFT; JACK APPLEFELD; TERRY APPLEFELD; ELLIS CAPLAN; TINA CAPLAN,
Plaintiffs-Appellants,

vs.

A. RAY ROBBINS; M. HELEN ROBBINS; JACEK ROSMARINOWSKY; ANN ROSMARINOWSKY; ASSOCIATION OF APARTMENT OWNERS OF PU'U PO'A; BOARD OF DIRECTORS OF THE ASSOCIATION OF APARTMENT OWNERS OF PU'U PO'A; JOHN DOES 1-10; JANE DOES 1-10; DOE MEMBERS OF THE BOARD OF DIRECTORS 1-100; DOE PU'U PO'A COMMITTEE MEMBERS 1-100; DOE PARTNERSHIPS 1-10; DOE CORPORATIONS 1-10; and DOE ENTITIES 1-10,
Defendants-Appellees.

APPEAL FROM THE FIFTH CIRCUIT COURT
(CIV. NO. 01-1-0142)

SUMMARY DISPOSITION ORDER
(By: Moon, C.J., Levinson, Nakayama, and Duffy JJ.;
With Acoba, J., Concurring Separately)

This case arises out of a dispute concerning the installation of atrium enclosures in certain units at the Pu'u Po'a condominium project located in Princeville, Kaua'i. The atrium enclosures were installed as part of a plan to remedy a longstanding water intrusion problem. Plaintiffs-Appellants Lloyd Ucko, Nancy Schoocraft, Jack Applefeld and Terry Applefeld, and Ellis Caplan and Tina Caplan [hereinafter, collectively, Plaintiffs] appeal from the Circuit Court of the Fifth Circuit's March 2, 2004 final judgment entered in favor of Defendants-Appellees A. Ray and M. Helen Robbins, and Jacek and Ann Rosmarinowsky, now known as Jack and Ann Ross [hereinafter,

collectively, Owner Defendants] and Defendants-Appellees Association of Apartment Owners of Puʻu Poʻa (the AOAO) and the Board of Directors of the AOAO (the Board) [hereinafter, collectively with Owner Defendants, Defendants].[1] As points of error, Plaintiffs contend that the circuit court erred in: (1) denying Plaintiffs' motion for partial summary judgment inasmuch as (a) Owner Defendants installed atrium enclosures without the Plaintiffs' consent, and (b) the AOAO and the Board "gave away" the common elements; (2) granting the AOAO and the Board's motion for summary judgment inasmuch as (a) the atrium enclosures were not necessary for, nor pursuant to, the repair or maintenance of the building, (b) a majority of owners did not approve the enclosures, and (c) the AOAO and the Board breached their fiduciary duty to preserve the common elements; (3) granting Owner Defendants' first motion for summary judgment inasmuch as (a) the enclosures directly affected Plaintiffs' enjoyment of their units, (b) the enclosures transferred common elements to private use, (c) the encroachment was not de minimis, (d) Owner Defendants installed enclosures that were not approved by a majority of owners, (e) Owner Defendants, and not the AOAO or the Board, had the enclosures installed, and (f) Owner Defendants were required to obtain Plaintiffs' consent prior to installation of the enclosures; (4) granting Defendants' second motion for

[1] The Honorable George M. Masuoka presided over this matter.

summary judgment as to Plaintiffs' contract claims inasmuch as the circuit court incorrectly concluded that Plaintiffs were not third-party beneficiaries of the modification/indemnification agreement between the AOAO and the owners, and thus, Plaintiffs could not enforce the terms against individual owners such as Owner Defendants; (5) awarding the AOAO and the Board attorneys' fees in the amount of $20,685.50 and costs in the amount of $629.31 because the circuit court based the award on the erroneous assumption that Plaintiffs did not demand mediation or arbitration before initiating their lawsuit; and (6) supplementing the record more than two years after the circuit court had granted Owner Defendants' motion for summary judgment.

Defendants respond that the circuit court did not err in denying Plaintiffs' motion for partial summary judgment or in granting Defendants' first and second motions for summary judgment. The AOAO and the Board also assert that Plaintiffs did not demand mediation or arbitration before initiating their lawsuit, and Hawai'i Revised Statutes (HRS) § 514A-94(b) (Supp. 1998)[2] therefore authorized the AOAO and the Board, as prevailing parties, to receive an award of attorneys' fees and costs. Owner Defendants further assert that the circuit court did not err when

[2] HRS chapter 514A was contingently repealed and recodified effective July 1, 2005. SB 2210, 22nd Leg., Reg. Sess. (Haw. 2004).

it supplemented the record with documents from related civil cases.

Upon carefully reviewing the record and the briefs submitted by the parties, and having given due consideration to the arguments advocated and the issues raised, we hold as follows:

(1) The atrium enclosures enclose atrium air space, and thus constitute an alteration or addition within an apartment. See Declaration of Horizontal Property Regime of Puʻu Poʻa [hereinafter, Declaration], Part 3.B(4) ("Each apartment shall be deemed to include . . . lanai and atrium air space, [and] planter areas, if any, adjacent to lanais and atriums[.]"). The addition to the privacy wall between Owner Defendants' units constitutes an addition to a limited common element rationally related only to Owner Defendants' units, and such addition does not convert common elements to private use. See HRS § 514A-3(7) (1993) (defining "limited common elements" as "those common elements designated in the declaration as reserved for the use of a certain apartment or certain apartments to the exclusion of the other apartments"); Declaration, Part 3.D(2) ("All . . . common elements of the property which are rationally related to less than all of said apartments shall be limited common

elements appurtenant to the apartments to which they are so related.");

(2) Defendants need not have obtained approval from Plaintiffs for the atrium enclosures because:

a. HRS § 514A-89 (1993) is inapplicable inasmuch as the plain language of that statute makes it applicable to work done by owners, whereas the installation here was done completely under the auspices and control of the Board as part of the solution to the water intrusion problem. The Board selected the contractors, coordinated and supervised the construction and installation of the atrium enclosures, and disbursed payments to the contractors. See State v. Haugen, 104 Hawai'i 71, 75, 85 P.3d 178, 182 (2004) ("[I]t is a cardinal rule of statutory interpretation that, where the terms of a statute are plain, unambiguous and explicit, we are not at liberty to look beyond that language for a different meaning. Instead, our sole duty is to give effect to the statute's plain and obvious meaning." (Citations and quotation signals omitted.)); HRS § 514A-89 ("No apartment owner shall do any work . . ., nor may any apartment owner add any material structure . . . ." (Emphases added.);

b. Section 11(G) of the Declaration is inapplicable because the atrium enclosures were not "additions or structural alterations to or exterior changes of any common elements of the property[.]" See Declaration, Section 11(G) (stating that the AOAO shall not "make any additions or structural alterations to or exterior changes of any common elements of the property . . . except . . . [where] approved by the Board and by a majority of apartment owners . . . including all owners of apartments thereby directly affected");

c. The Board did not abuse its discretion in determining that Plaintiffs were not "directly affected" owners. See Bylaws of Association of Apartment Owners of Pu'u Po'a [hereinafter, Bylaws], Article V, Section 4(d) (stating that alterations or additions within an apartment or within a limited common element appurtenant thereto, shall require the written consent of the Board "and all other Apartment Owners thereby directly affected (as determined by said Board)") (emphasis added);

(3) The Board had the power and duty to remedy the water intrusion problem. Allowing owners to elect to install atrium enclosures as a waterproofing method was proper because 83% of the owners approved of allowing such an

election, whereas less than 75% of the owners approved of requiring the water membrane solution. See Bylaws, Article III, Section 2 (stating that the Board has the power and duty to, inter alia, make additions, improvements, and repairs to the apartments and the common and limited common elements); Bylaws, Article V, Section 4(b) ("Any additions, alterations, repairs or improvements [of the common or limited common elements] costing in excess of TEN THOUSAND DOLLARS ($10,000.00) may be made by the Board only after obtaining approval of the Owners of seventy-five percent (75%) of the interests in the common elements.");

(4) Contrary to Plaintiffs' assertions, HRS § 514A-92.1 (1993) is not applicable inasmuch as the addition to the privacy wall is an addition to a limited common element, and pursuant to the "Modification/Indemnification Agreement" signed by owners who elected to install atrium enclosures and Article VI, Section 1(a) of the Bylaws, the enclosures are not subject to common expense. See HRS § 514A-92.1 ("Designation of additional areas to be common elements or subject to common expenses after the initial filing of the bylaws or declaration shall require the approval of ninety per cent of the apartment owners[.]" (Emphasis added.)); Bylaws, Article VI, Section 1(a) ("All charges separately attributable to an apartment or group of apartments . . .

shall be payable by the Owners of such apartments . . . and such amounts shall not be common expenses[.]");

(5) The circuit court did not err in finding that Plaintiffs were not third-party beneficiaries of the Modification/Indemnification Agreement between the AOAO and Owner Defendants inasmuch as neither party intended or agreed that third parties such as Plaintiffs would benefit from the agreement, as evidenced by removal of draft language which expressly gave other owners third-party beneficiary status, from the agreement signed by the AOAO and the Owner Defendants. See Blair v. Ing, 95 Hawai'i 247, 255, 21 P.3d 452, 460 (2001) ("The essence of a third-party beneficiary's claim is that others have agreed between themselves to bestow a benefit upon the third party but one of the parties to the agreement fails to uphold his portion of the bargain." (Emphasis added.)); Eastman v. McGowan, 86 Hawai'i 21, 28, 946 P.2d 1317, 1324 (1997) (holding that the defendants were not third-party beneficiaries of an agreement where the plaintiffs were to purchase two condominium units from the defendants, then sell the units and pay $50,000 to the Washington Investors from the proceeds of the sale because the purpose of the agreement was the discharge by the Washington Investors of all claims against the plaintiffs in return for $50,000);

(6) The circuit court did not err in awarding attorneys' fees in the amount of $20,685.50 and costs in the amount of $629.31 to the AOAO and the Board because: (1) only Kurt Ucko demanded arbitration; (2) Kurt Ucko was not the owner of Unit 408 at the time he submitted those demands; and (3) none of the actual owners (i.e., Plaintiffs in the instant case) ever demanded mediation or arbitration. See HRS § 514A-94(b) ("If any claim by an owner is not substantiated in any court action against an association, . . . then all reasonable and necessary expenses, costs, and attorneys' fees incurred by an association shall be awarded to the association, unless . . . prior to filing the action in a higher court the owner has first submitted the claim to mediation, or to arbitration[.]" (Emphasis added.));

(7) The circuit court did not err in supplementing the record to reflect that it had taken judicial notice of documents from prior related actions because the documents had been filed by parties to this action in two prior actions involving the same subject matter, before the same court. See State v. Akana, 68 Haw. 164, 165-66, 706 P.2d 1300, 1302 (1985) (holding that because the State requested the trial court to take judicial notice of a file in a case over which the court had just presided and which was in the court's immediate possession, it was "clear that the ready

availability and accuracy of the court records in the file could not be questioned" and "the trial court was mandated to take judicial notice of the court records"). Therefore,

IT IS HEREBY ORDERED that the circuit court's March 2, 2004 final judgment is affirmed.

DATED: Honolulu, Hawai'i, May 17, 2006.

On the briefs:

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(of Motooka Yamamoto
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Nancy Schoocraft, Jack
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A. Ray Robbins,
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Rosmarinowsky (now known as
Jack Ross and Ann Ross)

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Association of Apartment
Owners of Pu'u Po'a and
Board of Directors of
The Association of Apartment
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CONCURRENCE BY ACOBA, J.

I concur in the result only.