NO. 29959

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

KENNETH K. MIYASAKI, RICHARD H. MIYASAKI,
JANET H. MIYASAKI, and LYNETTE MIYASAKI,
Plaintiffs-Appellees,
v.
FRANK'S AUTO PAINT, INC.,
Defendant-Appellant

APPEAL FROM THE DISTRICT COURT OF THE FIRST CIRCUIT
HONOLULU DIVISION
(CIVIL NO. 1RC08-1-11490)

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

Defendant-Appellant Frank's Auto Paint, Inc. (Appellant) appeals from the June 25, 2009 (1) Judgment for Possession/Ejectment (Judgment), (2) Writ of Possession/Ejectment (Writ), (3) Order Granting Plaintiffs' Motion for Summary Judgment, Filed on April 7, 2009 (Order Granting Motion for Summary Judgment) and (4) Order Denying Defendant's Cross-Motion for Summary Judgment, Filed May 27, 2009 (Order Denying Cross-Motion for Summary Judgment) issued by the District Court of the First Circuit, Honolulu Division.[1/]

On appeal, Appellant contends that the Judgment, the Writ, the Order Granting Motion for Summary Judgment in favor of the Plaintiffs-Appellees Kenneth K. Miyasaki, Richard H. Miyasaki, Janet H. Miyasaki and Lynette Miyasaki (Appellees), and the Order Denying Cross-Motion for Summary Judgment in favor of the Appellant were erroneously issued since an enforceable rental contract had been negotiated and agreed to by the parties for the commercial real property located at 829, 903 and 905 Isenberg Street (the property) for the period of July 1, 2008 to June 30, 2010. Appellees, on the other hand, contend that the negotiations had been unsuccessful, and that, specifically, no agreement was reached regarding the amount of rent due.

[1/] The Honorable Christopher P. McKenzie presided.

Appellant surrendered possession of the property on or about August 1, 2009,[2/] and Appellees sold the property to a third party on April 23, 2010.

The Intermediate Court of Appeals (ICA) previously addressed the question of whether the appeal was moot at various times throughout the appeal. On January 22, 2010, the court initially denied without prejudice a motion to dismiss the appeal as moot, explicitly reserving the question of whether Appellant's appeal might become moot when the lease expired on June 30, 2010. On August 5, 2010, the ICA denied another motion to dismiss, again without prejudice to any arguments to be presented on the briefs, because it appeared that "the issue of possible damages depends on the outcome of the appeal."

The appeal having been fully briefed, and the process having run its course, we are afforded a complete factual picture against which to apply the law. 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 Appellant's points of error as follows:

The Order Denying Cross-Motion for Summary Judgment is not a final appealable order. HAW. REV. STAT. § 641-1(b) (1993); *Jenkins v. Cades Schutte Fleming & Wright*, 76 Hawai'i 115, 119, 869 P.2d 1334, 1338 (1994).

In addition, in light of the fact that Appellant has vacated the property, that the property has been sold to a third-party, and that the lease has expired,[3/] the appeal from the Order Granting Motion for Summary Judgment, the Judgment, and the Writ is moot. *Int'l Market Place Corp. v. Liza, Inc.*, 1 Haw. App. 491, 495, 620 P.2d 765, 768 (1980).

[2/] Appellees contend that Appellant abandoned the property on August 1, 2009, while Appellant concedes that it vacated the property on July 31, 2009.

[3/] Appellant's contention that it may be entitled to damages if it overpaid rent is not dependent on resolution of this appeal. Appellant filed, but subsequently withdrew an application for leave to file a counterclaim in the case. Consequently, Appellant's claim for damages is not at issue on appeal, and there is no present basis upon which Appellant can collect damages.

Therefore,

IT IS HEREBY ORDERED that the appeal from the June 25, 2009 Order Denying Defendant's Cross-Motion for Summary Judgment, filed on May 27, 2009, is dismissed for lack of appellate jurisdiction. The appeal from the June 25, 2009 Order Granting Plaintiffs' Motion for Summary Judgment, Filed on April 7, 2009, the June 25, 2009 Judgment for Possession/Ejectment, and the June 25, 2009 Writ of Possession/Ejectment is dismissed as moot.

DATED: Honolulu, Hawai'i, September 29, 2010.

On the briefs:

John F. Perkin and
Brandee J.K. Faria
(Perkin & Faria)
for Defendant-Appellant.

Craig T. Kugisaki
for Plaintiffs-Appellees.

Presiding Judge

Associate Judge

Associate Judge