

NO. CAAP-11-0001033

IN THE INTERMEDIATE COURT OF APPEALS  
OF THE STATE OF HAWAII

ELDON GARDNER, Plaintiff-Appellant,  
v.  
MARY M. LICHOTA, Defendant-Appellee.

APPEAL FROM THE DISTRICT COURT OF THE FIRST CIRCUIT  
KO'OLAUPOKO DIVISION  
(CIVIL NO. 1RC11-1-02280)

SUMMARY DISPOSITION ORDER

(By: Nakamura, C.J., Reifurth and Ginoza, JJ.)

Plaintiff-Appellant Eldon Gardner (Gardner) appeals from the Judgment entered on November 1, 2011 and also challenges the denial of Plaintiff's Motion to Alter Or Amend Judgment entered on November 9, 2011, in the District Court of the First Circuit, Ko'olaupoko Division (district court).<sup>1</sup> The district court entered Judgment in favor of Defendant-Appellee Mary M. Lichota (Lichota) and awarded Lichota attorney's fees of \$5,000. Gardner also challenges the district court's Memorandum of Decision filed on December 30, 2011, which provides the court's findings and conclusions supporting the Judgment.

On appeal, Gardner contends that the district court erred by (1) concluding that Lichota was the prevailing party on the issue of summary possession; (2) failing to enter judgment in Gardner's favor for damages, fees, and costs; (3) entering an

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<sup>1</sup> The Honorable Hilary B. Gangnes presided.

award of \$5,000 for attorneys' fees to Lichota under Hawai'i Revised Statutes (HRS) § 666-14 (1993); (4) holding that the fee for late rental payments was \$20 per month, rather than \$20 per day; (5) applying new theories of the case *sua sponte*; (6) ruling that Gardner's deductions of funds from Lichota's security deposit were improper; and (7) denying Gardner's Motion to Alter or Amend Judgment.

Gardner requests judgment in his favor for damages, an award of attorney's fees and costs, and additionally asks that upon remand, the case be assigned to a different judge.

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, as well as the relevant legal authorities, we resolve Gardner's appeal as follows.

### **I. Background**

Gardner, as landlord, and Lichota, as tenant, entered into a Residential Tenancy Agreement (lease) dated November 30, 2009. The lease for the subject premises (the Property), which was located in Kaneohe, Hawai'i, was for a two-year period beginning on January 1, 2010, at a rental amount of \$1,950 per month. On March 17, 2011, after Lichota paid her rent late on multiple instances, Gardner filed a Complaint in district court alleging that Lichota had broken the rental agreement and owed unpaid rent in the amount of \$1,950.00 and late fees in the amount of \$860. Gardner requested a judgment for possession of the Property, a writ of possession, and judgment against Lichota for \$2,810.00. Gardner attached the lease and a letter from Gardner to Lichota, dated March 4, 2011. In the March 4, 2011 letter, Gardner requested that Lichota pay fees in the amount of \$680<sup>2</sup> within five days, and stated that if he did not receive the \$680, he would "file for termination of [her] tenancy[.]" When

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<sup>2</sup> This amount was based on \$100 for two bounced checks and late fees computed at \$20 a day for each day that Gardner asserted Lichota had failed to pay rent when it was due.

Gardner filed his Complaint on March 17, 2011, Lichota had also failed to pay the rent for March and thus Gardner's Complaint sought the outstanding rent and late fees he asserted had been incurred up to that point.

A bench trial was held on June 13, 2011. The main issues at trial were whether Gardner was entitled to possession of the Property, Lichota's late rental payments, Lichota's bounced checks, and also the proper computation of late fees. Lichota admitted that she owed \$100 in nonsufficient funds (NSF) fees for two bounced checks, and that she had paid rent late on four occasions. Prior to trial, Lichota paid the outstanding rent for March 2011.

Following the trial, the district court determined that (1) Gardner "failed to meet his burden of showing by the preponderance of the credible evidence that he is entitled to possession" of the Property, and (2) the lease required a "\$20 flat fee" for a late rent payment, not \$20 per day as Gardner had asserted. The district court further determined that Lichota was entitled to reasonable attorney's fees pursuant to HRS § 666-14 and awarded \$5,000 in fees.

## **II. Prevailing Party for Summary Possession**

Although Gardner's first point of error is that the circuit court erred in determining that Lichota was the prevailing party on the summary possession issue, Gardner notes that "[t]he issue of possession is now moot as the lease expired on December 31, 2011 and Lichota has vacated the premises." Lichota does not dispute that she has vacated the premises. Thus, given Gardner's own assertion that possession is moot, we will not address the merits of that issue. See Queen Emma Found. v. Tatibouet, 123 Hawai'i 500, 506, 236 P.3d 1236, 1242 (App. 2010). However, we can still address Gardner's challenge to the award of attorney's fees to Lichota, which was based on the summary possession issue. Id. at 510-11, 236 P.3d at 1246-47. In doing so, *infra*, we will not inquire into the correctness of

the district court's ruling on the underlying summary possession issue. Id.

However, we first address some of Gardner's other points of error.

### **III. Late Rental Charges**

We next consider the question whether the district court correctly interpreted the lease to require a \$20 flat fee for late rental payments.

While a lease is both a conveyance and a contract, its essence is contractual; accordingly, we review the lease under principles of contract law. Generally, the construction and legal effect to be given a contract is a question of law freely reviewable by an appellate court.

Pancakes of Hawaii, Inc. v. Pomare Props. Corp., 85 Hawai'i 300, 304, 944 P.2d 97, 101 (App. 1997) (citations and internal quotation marks omitted). "[T]erms of a contract should be interpreted according to their plain, ordinary and accepted use in common speech, unless the contract indicates a different meaning." Id. at 305, 944 P.2d at 102 (quoting Amfac, Inc. v. Waikiki Beachcomber Inv. Co., 74 Haw. 85, 108-09, 839 P.2d 10, 24 (1992)) (internal quotation marks omitted). "The intention of the parties is to be gathered from the whole instrument, and if this cannot be discovered, but there exists an ambiguity, then such construction must prevail as is most strong against the covenantor [sic], for he or she might have expressed himself or herself more clearly." Id. (quoting Coney v. Dowsett, 3 Haw. 685, 686 (Haw. Kingdom 1876)) (internal quotation marks and some brackets omitted).

Section III of the lease, entitled "Rent," states that "[i]f rent is paid after the 5th of the month, there will be a late charge of \$20.00 assessed." (Some emphasis added.) Gardner contends *inter alia* that another section in the lease also applies, specifically Section XVI, entitled "Additional Provisions" which provides: "Lost keys replaced at cost plus \$25. Tenants agree to follow all house rules and requests from building management. Tenants will promptly pay any fines incurred

[sic] from association. Late fees will be \$20.00 per day." (Emphasis added.) Gardner thus argues that the late charge for unpaid rent is \$20 per day.

Lichota, on the other hand, argues that fees for late rent payments are to be computed at \$20 for each time rent is paid late, based on Section III.

The district court agreed with Lichota's interpretation of the lease. Upon *de novo* review, we agree with the district court's conclusion, although we more precisely determine that the lease provides for a late rent *charge* at \$20.00 *per instance* rent is paid late. Under Section III, late rent payment incurs "a late charge of \$20.00[.]" (Emphasis added.) The sentence referring to "late fees" of "\$20.00 per day" under section XVI does not purport to alter Section III and we cannot interpret the lease in that way. Rather, under the plain language of Section III, late rental payments incur a \$20.00 charge per late payment.

Even if we assumed Section XVI somehow applied to late rent, it would render the lease ambiguous and any ambiguity would be resolved against Gardner as the drafter of the lease.<sup>3</sup> See Pancakes of Hawaii, 85 Hawai'i at 305, 944 P.2d at 102.

#### **IV. Judgment in Favor of Gardner**

Gardner argues that the district court erred in failing to enter judgment in his favor as to damages. He contends it was undisputed that there were insufficient funds for two of Lichota's rental checks and that she paid rent late for four months. Moreover, the rent for March 2011 was outstanding when the Complaint was filed and was only paid after Lichota was served with the lawsuit.

We agree with Gardner that the district court erred by failing to enter judgment in his favor for damages on his breach of contract claim. Although Gardner incorrectly sought \$20 per day in late rent charges, Lichota did not contest that she paid

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<sup>3</sup> Gardner does not object to the district court's Finding of Fact that "[o]n December 5, 2009, tenant Mary Lichota entered into a written 'Residential Tenancy Agreement' that was drafted by landlord Eldon Gardner[.]"

rent late on four occasions.<sup>4</sup> Under our ruling above, that each late rent payment incurred a \$20 charge, Lichota owed \$80 in late rent charges. The district court also determined that "Ms. Lichota did not dispute that she owed Mr. Gardner \$100 for the two N.S.F. checks she wrote that were returned to Mr. Gardner's bank[.]" At the time of trial, the fact that Lichota had not paid any money for late rent charges or NSF fees was uncontested.

Relatedly, however, Gardner asserted before the district court that he was entitled to deduct amounts owed to him from Lichota's security deposit. Gardner contends the district court erred in determining<sup>5</sup> that his deduction of money from Lichota's security deposit was improper. The district court, however, did not address the propriety of Gardner's deduction from Lichota's security deposit in its Memorandum of Decision, which is the subject of this appeal. Gardner also states that "[t]he matter of Lichota's security deposit will be decided in future pending litigation[.]" Thus, we need not address the district court's statements regarding deductions from the security deposit to resolve this appeal.

Given the above, the district court should have entered judgment in favor of Gardner in the amount of \$180 (\$100 for NSF fees and \$80 for late rent charges).

#### **V. Attorney's Fees**

The district court awarded Lichota attorney's fees in the amount of \$5,000 and relied on HRS § 666-14 as the basis for the award. Gardner contends this was error and we agree.

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<sup>4</sup> In the Memorandum of Decision, the district court calculated the amount owed by Lichota for late rent charges as \$60 based on three months of late rental payments. However, Gardner correctly challenges this finding because at trial it was uncontested that Lichota paid rent late on four occasions and thus owed \$80.

<sup>5</sup> The district court made an oral ruling in this regard, but did not address the propriety of Gardner's deduction from Lichota's security deposit in its Memorandum of Decision.

[The appellate] court reviews the denial and granting of attorney's fees under the abuse of discretion standard. The same standard applies to [the appellate] court's review of the amount of a trial court's award of attorney's fees. An abuse of discretion occurs if the trial court has clearly exceeded the bounds of reason or has disregarded rules or principles of law or practice to the substantial detriment of a party litigant.

Chun v. Bd. of Trs. of Emps. Ret. Sys. of the State of Hawai'i, 106 Hawai'i 416, 431, 106 P.3d 339, 354 (2005) (internal quotation marks, citations, original brackets, and ellipses omitted).

As a general rule, each party is responsible for paying his or her own litigation expenses. This "American Rule" is subject to several exceptions that allow fee-shifting wherein the losing party pays the fees of the prevailing party when so authorized by statute, rule of court, agreement, stipulation, or precedent.

Taomae v. Lingle, 110 Hawai'i 327, 331, 132 P.3d 1238, 1242 (2006) (citations and some internal quotation marks omitted).

Even though we do not inquire into the correctness of the district court's ruling on summary possession, the court abused its discretion in awarding attorney's fees to Lichota under HRS § 666-14 because that statute does not provide a basis to award fees to a tenant in a summary possession action. HRS § 666-14 provides:

**§666-14 Writ stayed how, in proceedings for nonpayment of rent.** The issuing of the writ of possession shall be stayed in the case of a proceeding for the nonpayment of rent, if the person owing the rent, before the writ is actually issued, pays the rent due and interest thereon at the rate of eight per cent a year and all costs and charges of the proceedings, and all expenses incurred by plaintiff, including a reasonable fee for the plaintiff's attorney.

HRS § 666-14 specifically applies to a stay of a writ of possession and provides only for payment of *plaintiff's* (landlord's) reasonable attorney's fees. See HRS § 666-14. We disagree with Lichota's contention that HRS § 666-14 can be extended to allow an award of attorney's fees to a tenant who is defending against a summary possession action. Lichota's reliance on Forbes v. Hawaii Culinary Corporation, 85 Hawai'i 501, 511, 946 P.2d 609, 619 (App. 1997) is misplaced.

Moreover, although Lichota further contends that the district court's award of attorney's fees was proper under Section XI<sup>6</sup> of the lease and also HRS § 607-14 (2013 Supp.), we disagree. First, the district court did not address fees under Section XI of the lease and, moreover, under our ruling Gardner is entitled to judgment in his favor as to part of his Complaint. Thus, upon remand, the district court may address fees under Section XI if so moved by the parties, but its analysis will need to take into account our ruling. Second, HRS § 607-14 applies to actions in the nature of assumpsit, which in this case would encompass Gardner's claim for breach of the lease agreement.<sup>7</sup> As to this claim, Gardner's Complaint sought recovery of \$1,950 in unpaid rent (for the month of March 2011) and \$860 in late fees. Gardner did not prevail to the full extent of the fees he sought, but as noted above, he is entitled to a judgment for some of the fees he sought and, moreover, he did recover the rent for March 2011 when Lichota paid it after the filing of the lawsuit. Given these circumstances, we conclude that as to the assumpsit claims in this case, Gardner is the prevailing party and thus an award of fees to Lichota under HRS § 607-14 would not be appropriate.

Therefore, we vacate the district court's award of \$5,000 in attorney's fees to Lichota.

#### **VI. Other Issues On Appeal**

In light of our rulings above, we agree with Gardner that the district court erred in denying his motion to alter or amend the Judgment. However, we reject Gardner's remaining

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<sup>6</sup> Section XI of the lease provides:

##### **Attorney Fees**

1. In the event that any action is filed in relation to this Lease, the unsuccessful party in the action will pay to the successful party, in addition to all the sums that either party may be called on to pay, a reasonable sum for the successful party's attorney fees.

<sup>7</sup> Gardner's claim for summary possession is distinct from, and not part of, his assumpsit action for breach of contract. Forbes 85 Hawai'i at 510, 946 P.2d at 618-619.

points of error, including his request to have the case assigned to a different district court judge upon remand.

**VII. Conclusion**

Based on the foregoing, we vacate the Judgment entered on November 1, 2011, and the denial of Plaintiff's Motion to Alter Or Amend Judgment entered on November 9, 2011, both filed in the District Court of the First Circuit, Ko'olaupoko Division. We also vacate the district court's Memorandum of Decision filed on December 30, 2011, to the extent that it is inconsistent with this opinion.

The case is remanded to the district court for further proceedings consistent with this opinion.

DATED: Honolulu, Hawai'i, June 30, 2014.

On the briefs:

Jack C. Morse  
for Plaintiff-Appellant

Chief Judge

Gary Victor Dubin  
Peter T. Stone  
(Dubin Law Offices)  
for Defendant-Appellee

Associate Judge

Associate Judge