

Electronically Filed
Intermediate Court of Appeals
CAAP-14-0001379
17-JUN-2016
09:48 AM

CAAP-14-0001379, 14-0001381, & 14-0001384

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

CAAP-14-0001379

RONALD BROWN,
Administrator of the Estate of DON BROWN,
Plaintiff-Appellee,

v.

KEN BRENT, Individually and in his
Capacity as the President and Member of the
Board of Directors of the Association of
Apartment Owners of Kuhio Shores at Poipu;
ASSOCIATION OF APARTMENT OWNERS OF KUHIO SHORES AT POIPU,
by and through its Board of Directors,
Defendants-Appellants,

and

JOHN DOES 1-10; JANE DOES 1-10; DOE PARTNERSHIPS 1-10;
DOE CORPORATIONS 1-10; DOE "NON-PROFIT" CORPORATIONS 1-10;
and DOE GOVERNMENTAL ENTITIES 1-10,
Defendants

CAAP-14-0001381

RONALD BROWN,
Administrator of the Estate of DON BROWN,
Plaintiff-Appellee,

v.

KEN BRENT, Individually and in his
Capacity as the President and Member of the
Board of Directors of the Association of
Apartment Owners of Kuhio Shores at Poipu;
ASSOCIATION OF APARTMENT OWNERS OF KUHIO SHORES AT POIPU,
by and through its Board of Directors,
Defendants-Appellants,

and

JOHN DOES 1-10; JANE DOES 1-10; DOE PARTNERSHIPS 1-10;
DOE CORPORATIONS 1-10; DOE "NON-PROFIT" CORPORATIONS 1-10;
and DOE GOVERNMENTAL ENTITIES 1-10,
Defendants

CAAP-14-0001384

RONALD BROWN,
Administrator of the Estate of DON BROWN,
Plaintiff-Appellant,

v.

KEN BRENT, Individually and in his
Capacity as the President and Member of the
Board of Directors of the Association of
Apartment Owners of Kuhio Shores at Poipu;
ASSOCIATION OF APARTMENT OWNERS OF KUHIO SHORES AT POIPU,
by and through its Board of Directors,
Defendants-Appellees,

and

JOHN DOES 1-10; JANE DOES 1-10; DOE PARTNERSHIPS 1-10;
DOE CORPORATIONS 1-10; DOE "NON-PROFIT" CORPORATIONS 1-10;
and DOE GOVERNMENTAL ENTITIES 1-10,
Defendants

APPEAL FROM THE CIRCUIT COURT OF THE FIFTH CIRCUIT
(CV NO. 11-1-0194)

SUMMARY DISPOSITION ORDER

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

These consolidated appeals^{1/} arise out of a dispute between Plaintiff Don Brown (Brown),^{2/} the owner of an apartment unit in the Kuhio Shores at Poipu (Kuhio Shores) condominium project, and Defendants Association of Apartment Owners of Kuhio Shores (AOAO) and Ken Brent (Brent), the former president of the AOAO's Board of Directors. Brent and the AOAO will be referred to collectively as the "Board." In the underlying lawsuit, Brown

^{1/} By order of this court, Appeal Numbers CAAP-14-0001379, CAAP-14-0001381, and CAAP-14-0001384 were consolidated under CAAP-14-0001379.

^{2/} Don Brown died during the pendency of the consolidated appeals, and Ronald Brown, as administrator of the estate of Don Brown, was substituted as a party for Don Brown. In this Summary Disposition Order, we will refer to both Don Brown and Ronald Brown, as administrator of the estate of Don Brown, as "Brown."

challenges the decisions of the Board: (1) to repaint the exterior walls of the Kuhio Shores condominium project a different color without owner approval; (2) to paint or replace exterior louvered doors, including two exterior doors installed in front of the main doors to Brown's apartment, without the approval of Brown and the other affected owners; and (3) not to purchase teak doors from Bali that a majority of owners had approved.

Brown filled a complaint against the Board,^{3/} alleging various claims relating to the foregoing decisions of the Board. The Board filed its answer and also a counterclaim seeking, among other things, declaratory relief that it had acted properly in making the decisions challenged by Brown.

Brown filed a motion for summary judgment on certain claims in his complaint and on the Board's counterclaim. The Circuit Court of the Fifth Circuit (Circuit Court)^{4/} partially granted Brown's motion "as to any issues in connection with the painting of the exterior louvered doors[,] " and it denied Brown's motion as to all other issues.^{5/}

The Board filed three motions for partial summary judgment. The Circuit Court partially granted the Board's motions as to any issues in connection with the Board's non-

^{3/} Brown sued: (1) Brent, individually and in his capacity as President and Member of the Board of Directors of the AOA; and (2) the AOA, by and through its Board of Directors.

^{4/} The Honorable Randal G.B. Valenciano presided over the proceeding relevant to these consolidated appeals.

^{5/} On August 6, 2014, the Circuit Court filed its "Order Granting in Part and Denying in Part Plaintiff's Motion for Summary Judgment Dated May 9, 2014" (Order on Brown's Motion for Summary Judgment). Based on its grant of summary judgment in favor of Brown on any issues in connection with the painting of the exterior louvered doors, the Circuit Court entered its "Final Judgment As To Count II of Counterclaim" on November 21, 2014.

purchase of the Bali teak doors. The Circuit Court denied the Board's motions with respect to all other issues.^{5/}

I.

In its appeals, the Board contends that the Circuit Court erred in: (1) denying its motion for summary judgment on its counterclaim for declaratory relief regarding its decision to repaint the exterior walls of the Kuhio Shores condominium project a different color without owner approval; and (2) granting summary judgment in favor of Brown regarding the Board's decision to paint or replace the exterior louvered doors without obtaining owner approval.^{2/} In his appeal, Brown contends that the Circuit Court erred in granting the Board's motion for summary judgment on the claims relating to the Board's decision not to purchase the Bali teak doors.^{3/} As explained below, we affirm Circuit Court's denial of summary judgment with respect to the issue concerning the repainting of the exterior walls of the condominium project. We vacate the Circuit Court's grant of summary judgment on the issues connected with the painting of the exterior louvered doors and the non-purchase of the Bali teak doors.

^{5/} On July 22, 2014, the Circuit Court entered its "Order Denying in Part and Granting in Part Defendants'[:] (1) Motion for Partial Summary Judgment Regarding Count I of Defendants' Counterclaim and Plaintiff's Corresponding Claims; (2) Motion for Partial Summary Judgment Regarding Business Judgment of the Board Re: The Teak Louver Doors; and (3) Motion for Summary Judgment Re: Plaintiff's Claim for Relief (Tortious Interference With Prospective Economic Advantage)" (Order on the Board's Summary Judgment Motions).

^{2/} The Board appeals from the "Final Judgment on Count II of the Counterclaim." This appeal was docketed as Appeal No. CAAP-14-0001379. The Board also appeals from Section A of the Order on the Board's Summary Judgment Motions pursuant to the Circuit Court's order granting the Board's motion for an interlocutory appeal as to Section A. This appeal was docketed as Appeal No. CAAP-14-0001381.

^{3/} Brown appeals from Sections B and C of the Order on the Board's Summary Judgment Motions pursuant to the Circuit Court's order granting Brown's motion for an interlocutory appeal as to Sections B and C. Brown's appeal was docketed as Appeal No. CAAP-14-0001384.

III.

We resolve the issues raised by the parties on appeal as follows:

A.

The Board argues that the Circuit Court erred in denying its motion for summary judgment with respect to its decision to repaint the exterior walls of the condominium project a different color without owner approval. In support of its motion for summary judgment, the Board argued that pursuant to Hawaii Revised Statutes (HRS) § 514B-140(c) (2006), only Board approval, and not owner approval, was required for nonmaterial alterations to the common elements.

HRS § 514B-140(c) provides, in relevant part:

Subject to the provisions of the declaration, nonmaterial additions to or alterations of the common elements or units, including, without limitation, additions to or alterations of a unit made within the unit or within a limited common element appurtenant to and for the exclusive use of the unit, shall require approval only by the board, which shall not unreasonably withhold the approval, and such percentage, number or group of unit owners as may be required by the declaration or bylaws. . . .

(Emphases added.) For purposes of HRS § 514B-140(c), a "nonmaterial" addition or alteration means:

an addition to or alteration of the common elements or a unit that does not jeopardize the soundness or safety of the property, reduce the value thereof, impair any easement, detract from the appearance of the project, interfere with or deprive any nonconsenting owner of the use or enjoyment of any part of property, or directly affect any nonconsenting owner.

HRS § 514B-140(c).

The Board presented evidence from a real estate broker that the change in the exterior paint color had no adverse effect on the value of the Kuhio Shores condominium project or Brown's unit. Based on this evidence, which the Board asserts was uncontroverted, the Board argued to the Circuit Court that repainting the exterior walls of the condominium project a different color was a nonmaterial alteration for which only Board approval was required under HRS § 514B-140(c). The Circuit Court

ruled that whether the change in the exterior paint color was a "material" or "nonmaterial" alteration presented a genuine issue of fact and therefore denied the Board's motion for summary judgment.

On appeal, the Board argues that the Circuit Court erred in concluding that whether the change in the paint color was a material or nonmaterial alteration presented a genuine issue of fact in denying the Board's motion for summary judgment. We disagree with the Board's argument.

Although the Board presented evidence that the change in the exterior paint color did not adversely affect the value of the condominium project, the definition of a "nonmaterial" alteration under HRS § 514B-140(c) encompasses factors that go beyond valuation. The Board did not present evidence on other aspects of the definition of a "nonmaterial" alteration, such as whether the change in paint color detracted from the appearance of the project or directly affected any nonconsenting owner, that was sufficient to show the absence of any genuine issue of fact on whether the change in paint color was a nonmaterial alteration. We therefore reject the Board's contention that the Circuit Court erred in concluding that whether the change in paint color was a material or nonmaterial alteration presented a genuine issue of fact.^{2/}

B.

The Board argues that the Circuit Court erred in granting summary judgment in favor of Brown regarding the issue of the painting or replacement of the exterior louvered doors. Critical to the Circuit Court's ruling was its plain-language interpretation of Section A.1.(1) of the Kuhio Shores'

^{2/} We note that in his answering brief, Brown contends that without reference to the issue of materiality, the Circuit Court committed plain error in failing to grant summary judgment in his favor on the issue of the Board's repainting of the exterior walls. However, Brown did not obtain authorization to file an interlocutory appeal from the Circuit Court's denial of his motion for summary judgment on this issue, and we decline to address his argument in this appeal.

Declaration of Horizontal Property Regime (Declaration) to mean that the exterior doors were part of an owner's apartment. The Board indicates that it does not dispute that if the exterior doors were part of the apartment, then owner approval (which it did not obtain) was necessary to paint or replace the exterior doors. However, the Board contends that the exterior doors were not part of the apartment.

Section A.1.(1) of the Declaration provides:

The respective apartments shall not be deemed to include the undecorated or unfinished surfaces of the perimeter or party walls or interior load-bearing walls, the floor and ceiling surrounding each apartment, or any pipes, wires, conduits, or other utility or service lines running through such apartments which are utilized for or serve more than one apartment, the same being deemed common elements as hereinafter provided. Each apartment shall be deemed to include all fixtures originally installed therein, the lanai air space, all the walls and partitions which are not load bearing within its perimeter or party walls, the inner decorated or finished surfaces of all walls, floors and ceilings, doors and door frames, windows and window frames and lanais.

(Emphases added).^{10/}

The Board argues that the phrase "the inner decorated or finished surfaces" as used in Section A.1.(1) modifies "doors and door frames," and therefore, the exterior doors which were installed outside of the main doors to an apartment were not part of the apartment. The Circuit Court, however, rejected the Board's reading and found that Section A.1.(1) provides that doors and door frames are part of the apartment.

We conclude that both the Board's reading and the Circuit Court's reading of Section A.1.(1) are reasonable and therefore the provision is ambiguous. See Hawaiian Ass'n of Seventh-Day Adventists v. Wong, 130 Hawai'i 36, 45, 305 P.3d 452, 461 (2013) ("A contract is ambiguous when its terms are

^{10/} The Declaration further provides that the common elements of the project are all of the remaining portions of the project that are not part of the apartments.

reasonably susceptible to more than one meaning.")^{11/} We further conclude that whether the exterior doors were part of an apartment presents an issue of material fact and that the Circuit Court erred in determining that the exterior doors were part of an apartment as a matter of law. See *id.* at 45-46, 305 P.3d 462-63 (noting that where the terms of a contract are ambiguous, the court may consider extrinsic evidence to determine the meaning of the contract language). Moreover, even if the exterior doors were considered part of an apartment, there is a question of whether Brown's installation of his exterior doors violated the provision of the AOA's Amended Bylaws which requires an owner to obtain Board consent before making changes to the exterior of his or her apartment.^{12/} We therefore vacate the Circuit Court's grant of summary judgment regarding the issue of the painting or replacement of the exterior louvered doors.

C.

Brown argues that the Circuit Court erred in granting summary judgment in favor of the Board on the issue relating to the Board's decision not to purchase the Bali teak doors. The Circuit Court granted summary judgment on this issue based on its ruling that "both the Board and the Owners had to approve the

^{11/} There are impediments to accepting either of the competing interpretations of Section A.1.(1). If the phrase "the inner decorated or finished surfaces" modifies "doors and door frames," there should be an "and" inserted before the phrase "the inner decorated or finished surfaces." On the other hand, if the phrase "the inner decorated or finished surfaces" does not modify "doors and door frames," then Section A.1.(1) is internally inconsistent in that it both provides (1) that an apartment shall not be deemed to include "the floor and ceiling surrounding each apartment" and (2) that an apartment shall be deemed to include "floors and ceilings[.]"

^{12/} Section 9.3(a) of the AOA's Amended Bylaws provides, in relevant part:

It is the intent of the owners that the apartments have a uniform exterior appearance and that no changes be made to apartments which are visible from the exterior of the Project without permission of the board. Therefore, . . . an owner of an apartment shall not, without the prior written consent of the board, . . . make any alterations in or additions to the exterior of his apartment

[purchase of] the Bali Teak Louvered Doors and the Board never approved [the purchase] of the Bali Teak Louvered Doors."

The Circuit Court's conclusion that the Board never approved the purchase of the Bali teak doors was based on its reading of a letter sent by the Board to apartment owners, which sought the owners' approval for the purchase of the Bali teak doors. In letter stated, in relevant part:

Enclosed you will find a written consent form regarding a proposal to replace the entry louver doors. The Board of Directors has not taken a position on this proposal but is going to submit the issue to a vote of the owners. After conferring with our attorney we have determined that a 50.01% majority, based on the ownership percentage, will decide this issue. Please return the written consent form in the enclosed envelope. As the consent forms are returned, the management company will keep a running total. Once this total represents a 50+% majority either in favor or against, the issue will be deemed decided. . . .

A majority of owners submitted consent forms approving the purchase of the Bali teak doors.

Brown argues that the Circuit Court erred in relying on the Board's letter to conclude that the Board had never approved the purchase of the Bali teak doors. Brown contends that when the evidence is viewed in the light most favorable to him as the non-movant, it can be inferred based on the letter that the Board had approved the purchase of the Bali teak doors by agreeing to be bound by the vote of the majority of owners on the proposal ("Once this total represents a 50+% majority either in favor or against, the issue will be deemed decided[.]"). Brown also cites evidence that after the owners' vote, the Board began collecting assessments from owners to pay for the Bali teak doors, which Brown claims shows that the Board had approved or ratified the owners' decision to purchase the doors.

We agree with Brown that the letter did not provide definitive evidence that the Board had never approved the purchase of the Bali teak doors and that there were genuine issues of fact regarding whether the Board had approved the purchase. Accordingly, we conclude that the Circuit Court erred in granting summary judgment based on its determination that the

Board had never approved the purchase of the Bali teak doors, and we vacate the Circuit Court's grant of summary judgment regarding the non-purchase of the Bali teak doors.^{13/}

IV.

For the foregoing reasons, we: (1) affirm the portion of the Order on the Board's Summary Judgment Motions that the Board challenges on appeal; (2) vacate the "Final Judgment As To Count II of Counterclaim"; (3) vacate the portions of the Order on the Board's Summary Judgment Motions that Brown challenges on appeal; and (4) remand the case for further proceedings consistent with this Summary Disposition Order.

DATED: Honolulu, Hawai'i, June 17, 2016.

On the briefs:

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Craig H. Nakamura
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^{13/} It is clear from the Circuit Court's order that in granting summary judgment, the Circuit Court did not rely on the Board's argument that the Board's decision not to purchase the Bali teak doors was a valid exercise of its business judgment. We decline to reach on appeal the issue of whether the Board was entitled to summary judgment based on its argument pertaining to the business judgment rule, which we leave for the Circuit Court to decide in the first instance on remand. See C. Brewer & Co. v. Marine Indem. Ins. Co. of Am., 135 Hawai'i 190, 200, 374 P.3d 163, 173 (2015); Blake v. County of Kaua'i Planning Commission, 131 Hawaii 123, 130 n.7, 315 P.3d 749, 756 n.7 (2013).