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NO. CAAP-19-0000378

IN THE INTERMEDIATE COURT OF APPEALS  
OF THE STATE OF HAWAI'I

TROPICAL PLUMBING & BATH, INC.,  
Plaintiff/Counterclaim Defendant-Appellee,  
v.  
ASSOCIATION OF APARTMENT OWNERS OF MOANA PACIFIC,  
Defendant/Counterclaimant/Third-Party Plaintiff-Appellant,<sup>1</sup>  
v.  
MELVIN CHARLES BEECK, JR.; RANDY KOWALKOWSKI; HAWAII FIRST,  
INC., Third-Party Defendants-Appellees  
and  
JOHN DOES 1-10; JANE DOES 1-10; DOE PARTNERSHIPS 1-10; JOHN  
CORPORATIONS 1-10; DOE ASSOCIATIONS 1-10; DOE LIMITED LIABILITY  
COMPANIES 1-10; DOE "NON-PROFIT" CORPORATIONS 1-10; and DOE  
GOVERNMENTAL ENTITIES 1-10, Defendants

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT  
(CASE NO. 1CC161000689)

**SUMMARY DISPOSITION ORDER**

(By: Hiraoka, Presiding Judge, McCullen and Guidry, JJ.)

The Association of Apartment Owners of Moana Pacific (**AOAO**) appeals from the Hawai'i Rules of Civil Procedure (**HRCP**) Rule 54(b) judgment for **Tropical** Plumbing & Bath, Inc. and its owner, Melvin Charles **Beeck**, Jr., entered by the Circuit Court of

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<sup>1</sup> Association of Apartment Owners of Moana Pacific's counterclaims against Melvin Charles Beeck, Jr., Randy Kowalkowski, and Hawaii First, Inc. were incorrectly titled. They were actually third-party complaints. See HRCP Rules 7(a), 14(a).

the First Circuit on April 23, 2019.<sup>2</sup> The AOA challenges the: **(1)** July 7, 2016 order denying its motion to dismiss Tropical's complaint;<sup>3</sup> and **(2)** February 11, 2019 order granting in part and denying in part Tropical and Beeck's motion for partial summary judgment. We affirm in part, vacate in part, and remand for further proceedings.

**(1)** We review a ruling on a motion to dismiss de novo. We assume the facts alleged in Tropical's complaint are true and view them in the light most favorable to Tropical to determine if they warrant relief under any legal theory. Bank of Am., N.A. v. Reyes-Toledo, 143 Hawai'i 249, 256-57, 428 P.3d 761, 768-69 (2018).

Tropical's complaint alleged that Tropical contracted with the AOA to hydro-jet the Moana Pacific's laundry and kitchen sink drain lines. A copy of the contract was attached. The AOA terminated the contract before Tropical began its work.

The AOA argued the contract was void because it didn't contain information about lien rights, bonding, and Tropical's statutory right to resolve alleged construction defects before litigation, as required by Hawaii Revised Statutes (**HRS**) § 444-25.5.

Tropical argued that the AOA was not a "homeowner" to whom HRS § 444-25.5 applied. We need not resolve that legal issue because HRS § 444-25.5 does not apply to a contract for maintenance work that does not require a permit. Hawaii Administrative Rules (**HAR**) § 16-77-80(c) (eff. 2002). Viewing the allegations in the complaint in the light most favorable to Tropical, the scope of work under Tropical's contract is "service-type work (e.g., maintenance work performed by . . . plumbing contractors) that does not require a permit by a county or other local subdivision of the State." Id. The circuit court was not wrong to deny the AOA's motion to dismiss.

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<sup>2</sup> The Honorable James C. McWhinnie presided.

<sup>3</sup> The Honorable Virginia L. Crandall presided.

(2) Tropical and Beeck moved for partial summary judgment on its claim for breach of contract and the AOA's counterclaim for negligent misrepresentation and fraud in the inducement on December 21, 2018.<sup>4</sup> The AOA counter-moved for partial summary judgment on Tropical's claim for breach of contract on December 28, 2018. On February 11, 2019, the circuit court entered orders granting summary judgment for Tropical on its claim for breach of contract and on the AOA's claims for negligent misrepresentation, fraud, and conspiracy, and denying the AOA's counter-motion.

We review a grant of summary judgment de novo. Nozawa v. Operating Engineers Local Union No. 3, 142 Hawai'i 331, 338, 418 P.3d 1187, 1194 (2018). Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. Id. at 342, 418 P.3d at 1198. A fact is material if it would establish or refute an element of a cause of action or defense. Id. The evidence is viewed in the light most favorable to the non-moving party. Id.

(a) The AOA's second amended counterclaim alleged that Beeck negligently misrepresented Tropical's hydro-jetting experience, and that Beeck, Tropical's CEO Olivia **Kwong**, and the AOA's former resident manager Randy **Kowalkowski** fraudulently induced the AOA to sign the contract.

To prove negligent misrepresentation the AOA must show: (1) false information was supplied because of failure to exercise reasonable care or competence in communicating the information; (2) the AOA relied on the false information; and (3) the AOA suffered a loss. Santiago v. Tanaka, 137 Hawai'i

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<sup>4</sup> Tropical moved for summary judgment on its claim for breach of the implied covenant of good faith and fair dealing, but that claim was dismissed by stipulation of the parties on February 12, 2019. Tropical also moved for summary judgment on the AOA's counterclaim that Beeck, Kwong, and Kowalkowski conspired to defraud the AOA, but "[c]ivil conspiracy does not alone constitute a claim for relief." Robert's Haw. Sch. Bus, Inc. v. Laupahoehoe Transp. Co., 91 Hawai'i 224, 260 n.44, 982 P.2d 853, 889 n.44 (1999) (citations omitted), superseded on other grounds by statute as noted in, Haw. Med. Ass'n v. Haw. Med. Serv. Ass'n, Inc., 113 Hawai'i 77, 106-07, 148 P.3d 1179, 1208-09 (2006).

137, 154, 366 P.3d 612, 629 (2016). To prove fraudulent inducement sufficient to invalidate the contract, the AOA must show (1) a representation of a material fact, (2) made to induce the AOA to act, (3) known to be false but reasonably believed true by the AOA, and (4) on which the AOA reasonably relied and acted to its damage. Matsuura v. E.I. du Pont de Nemours & Co., 102 Hawai'i 149, 162-63, 73 P.3d 687, 700-01 (2003).

Viewed in the light most favorable to the AOA, the AOA's evidence showed that Tropical misrepresented its hydro-jetting experience to the AOA, and the AOA relied on Tropical's misrepresentation and would not have contracted with Tropical had it known of Tropical's lack of experience. Tropical argues that any misrepresentation to the AOA was made by Kowalkowski (the AOA's resident manager), not Tropical. But the AOA presented evidence of the relationship between Kowalkowski and Beeck that, when viewed in the light most favorable to the AOA, could show that Kowalkowski acted as Tropical's agent. Whether Tropical exercised reasonable care or competence in communicating its hydro-jetting experience, whether Kowalkowski was Tropical's agent, and whether the AOA's reliance was reasonable, are questions for the trier of fact that should have precluded summary judgment.

**(b)** If the AOA proves that Tropical fraudulently induced it to contract for the hydro-jetting, the contract would be invalid. There were genuine issues of material fact precluding summary judgment on the AOA's fraudulent inducement claim. The circuit court thus erred by granting summary judgment for Tropical on its breach-of-contract claim.

For these reasons, the July 7, 2016 "Order Denying Defendant Association of Apartment Owners of Moana Pacific's Motion to Dismiss Plaintiff Tropical Plumbing & Bath, Inc.'s Complaint with Prejudice, Filed on May 31, 2016" is affirmed; the February 11, 2019 "Order Granting in Part and Denying in Part Without Prejudice Plaintiff/Counterclaim Defendant Tropical Plumbing & Bath, Inc. and Additional Counterclaim Defendant

Melvin Charles Beeck, Jr.'s Motion for Partial Summary Judgment, Filed on December 21, 2018" is vacated; the April 23, 2019 "HRCP Rule 54(b) Judgment in Favor of Plaintiff/Counterclaim Defendant Tropical Plumbing & Bath, Inc. and Counterclaim Defendant Melvin Charles Beeck, Jr. and Against Defendant/Counterclaim Plaintiff Association of Apartment Owners of Moana Pacific" is vacated; and this case is remanded to the circuit court for further proceedings consistent with this summary disposition order.

DATED: Honolulu, Hawai'i, April 12, 2024.

On the briefs:

R. Laree McGuire,  
for Defendant/Counter-  
claimant/Third-Party  
Plaintiff-Appellant  
Association of  
Apartment Owners of  
Moana Pacific.

/s/ Keith K. Hiraoka  
Presiding Judge

/s/ Sonja M.P. McCullen  
Associate Judge

/s/ Kimberly T. Guidry  
Associate Judge

Ross T. Shinyama,  
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Counterclaim Defendant-  
Appellee Tropical Plumbing  
& Bath, Inc. and Third-Party  
Defendant-Appellee Melvin  
Charles Beeck, Jr.