

FIRST CIRCUIT COURT
STATE OF HAWAII
FILED

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A Limited Liability Law Partnership

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REALTY LAUA LLC

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

LEWERS FALETOGO; HAZEL)	CIVIL NO. 08-1-2608-12 (SSM)
MCMILLON; GENE STRICKLAND;	)	(Other Civil Action)
TRUDY SABALBORO; and LEE)	
SOMMERS, individually and on behalf of	)	DEFENDANT REALY LAUA LLC'S
a class of past, present, and future residents	)	MOTION FOR SUMMARY JUDGMENT;
of Kuhio Park Terrace,	)	MEMORANDUM IN SUPPORT OF
	)	MOTION; DECLARATION OF R. AARON
Plaintiffs,	)	CREPS; EXHIBITS "A"- "D"; NOTICE OF
	)	HEARING MOTION AND CERTIFICATE
vs.	)	OF SERVICE
)	
STATE OF HAWAII; HAWAII PUBLIC	)	<u>HEARING:</u>
HOUSING AUTHORITY; REALTY)	
LAUA LLC, formerly known as R & L	)	Date: <u>JUL 27 2009</u>
Property Management LLC, a Hawai'i	)	Time: <u>9:00 am</u>
limited liability company; and Does 1-20,	)	Judge: Hon. Sabrina S. McKenna
)	
Defendants.	)	NO TRIAL DATE
)	

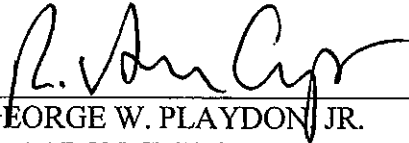
DEFENDANT REALY LAUA LLC'S MOTION FOR SUMMARY JUDGMENT

COMES NOW Defendant REALTY LAUA LLC ("Realty"), by and through its attorneys, O'Connor Playdon & Guben LLP, and hereby moves this Honorable Court for an order granting summary judgment in Realty's favor as to all claims asserted against it in Plaintiffs' Complaint, filed herein on December 18, 2008.

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This Motion is made pursuant to Rules 7 and 56 of the Hawaii Rules of Civil Procedure, and is based on the memorandum, declaration, and exhibits attached hereto, and the records and files herein.

DATED: Honolulu, Hawaii, June 18, 2009.



GEORGE W. PLAYDON JR.
R. AARON CREPS
Attorneys for Defendant
REALTY LAUA LLC

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

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)	
Defendants.)	
)	

MEMORANDUM IN SUPPORT OF MOTION

I. INTRODUCTION

This case concerns the living conditions at Kuhio Park Terrace and Kuhio Homes (collectively "KPT"), public housing projects on Oahu. Plaintiffs, who will be seeking class certification at some point, contend that the State of Hawaii, Hawaii Public Housing Authority (collectively "HPHA"), and Realty Laua LLC ("Realty") are liable to them for allegedly substandard elevator service, trash chute fires, lack of necessary fire equipment, lack of hot water, and pest infestation. HPHA owns and operates KPT, and has contracted with Realty to provide certain management services.

In their Complaint filed December 18, 2008, Plaintiffs assert three causes of action against Realty: (1) breach of the contract between HPHA and Realty (Third Cause of Action), (2) unfair and deceptive trade practices in violation of Hawaii Revised Statutes ("HRS") §480-2

(Fourth Cause of Action), and (3) medical monitoring (Fifth Cause of Action). See Exhibit "A", Complaint filed December 18, 2008. Realty is entitled to summary judgment on each count as a matter of law.

As to the Third Cause of Action, Plaintiffs are not party to the contract between HPHA and Realty. And there is absolutely no evidence that Plaintiffs are intended third-party beneficiaries of said contract. Therefore, Plaintiffs lack standing to enforce the terms of the contract between HPHA and Realty.

Plaintiffs' unfair and deceptive trade practices claim fails as well. HRS Chapter 480 applies to contracts for the purchase of goods, services, or personal investments. The Hawaii Supreme Court in Cieri v. Leticia Query Realty, Inc., 80 Haw. 54, 905 P.2d 29 (Haw. 1995) held that real property is not a "good", as that term is used in HRS Chapter 480. It is obvious that a real property lease is not an agreement for services. Further, under Cieri, a public housing lease cannot be considered a "personal investment". Consequently, Plaintiffs' HRS Chapter 480 claim against Realty fails as a matter of law.

Finally, the Court has previously ruled that medical monitoring is a remedy, not a "claim". Thus, Realty is entitled to summary judgment on Plaintiffs' Fifth Cause of Action by virtue of the law of the case doctrine.

II. STANDARD OF REVIEW

Pursuant to Rule 56 of the Hawaii Rules of Civil Procedure, summary judgment is available when the record shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. See Gum v. Nakamura, 57 Haw. 39, 549 P.2d 471 (1976); see also Amfac, Inc. v. Waikiki Beachcomber Inv. Co., 74 Haw. 85, 104, 839 P.2d 10 (1992), King v. Ilikai Properties, Inc., 2 Haw. App. 359, 632 P.2d 657 (1981). The party moving for summary judgment "may discharge his burden by demonstrating that if the case went

to trial there would be no competent evidence to support a judgment for his opponent.” First Hawaiian Bank v. Weeks, 70 Haw. 392, 396, 772 P.2d 1187, 1190 (1989) (citation omitted).

“[O]nce the movant satisfies the initial burden of showing the absence of a genuine issue of material fact, ‘then the burden shifts to the opponent to come forward with specific facts showing that there remains a genuine issue for trial.’” Arimizu v. Financial Sec. Ins. Co., 5 Haw. App. 106, 110, 679 P.2d 627, 632 (1984). The opposing party who cannot show that countervailing evidence will be available at trial is not entitled to a denial of a motion for summary judgment on the basis of a hope that such evidence will develop at trial. See State v. Midkiff, 49 Haw. 456, 421 P.2d 550 (1966); Waimea Falls Park, Inc. v. Brown, 6 Haw. App. 83, 95, 712 P.2d 1136, 1144 (1985).

Moreover, “[w]here the defendant is the moving party, the defendant is entitled to judgment as a matter of law if (1) viewing the record in the light most favorable to the plaintiff, no genuine issue of material fact exists with respect to one or more of the essential elements of the claim which the motion questions or of the defense which the motion seeks to establish; and (2) it is clear that the plaintiff is not entitled to recover under any discernible theory.” Atahan v. Muramoto, 91 Haw. 345, 347, 984 P.2d 104, 106 (Haw. App. 1999).

III. ARGUMENT

A. THERE IS NO EVIDENCE THAT PLAINTIFFS ARE INTENDED THIRD-PARTY BENEFICIARIES OF THE MANAGEMENT CONTRACT BETWEEN HPHA AND REALTY.

As a general rule, “third parties do not have enforceable contract rights. The exception to the general rule involves intended third-party beneficiaries.” Pancakes of Hawaii, Inc. v. Pomare Props. Corp., 85 Haw. 300, 309, 944 P.2d 97, 106 (Haw. App. 1997). “[A] prime requisite to the status of ‘third party beneficiary’ under a contract is that the parties to the contract must have intended to benefit the third party, who must be something more than a mere incidental beneficiary.” AOAO Newtown Meadows v. Venture 15, Inc., 115 Haw. 232, 270, 167 P.3d 225, 263 (Haw. 2007). Plaintiffs bear the burden of identifying language in the contract between HPHA and Realty which constitutes a “*virtual express declaration* to overcome the presumption that the parties contracted only for themselves.” Id. at 272, 167 P.3d at 265 (emphasis added).

The contract between HPHA and Realty does not refer to Plaintiffs (or other tenants), does not refer to Plaintiffs’ leases, and does not incorporate by reference the terms of the leases. See Exhibit “B”, Declaration of Robert Faleafine, Exhibit “1” thereto, Scope of Services at 1, ¶1; 2, ¶6. In addition, Realty is considered an “independent contractor” under its agreement with HPHA. See id. General Conditions at 2, ¶(a).

Likewise, the lease between Plaintiffs and HPHA does not refer to Realty, does not refer to the contract between Realty and HPHA, and certainly does not incorporate by reference the contract between Realty and HPHA. In fact, the only documents that are incorporated by reference are the (1) Project Rules, (2) Grievance Procedures, and (3) Pet Policy. See Exhibit “C”, Declaration of Chad Taniguchi, Exhibit “2” thereto, Rental Agreement at 4, ¶10 (p).

Moreover, under the lease between Plaintiffs and HPHA, all “grievances” related to Plaintiffs’ occupancy of their units are required to be processed through HPHA’s grievance

procedure. See id. at 4, ¶10 (n). Realty is not a party to HPHA's grievance procedure. See id. Grievance Procedure. All grievances relating to KPT are to be brought solely against HPHA. See id. Thus, under the terms of their leases, Plaintiffs have no recourse against Realty.

On this record, there is simply no evidence that Plaintiffs are an intended third-party beneficiary of the management contract between Realty and HPHA. Consequently, Plaintiffs lack enforceable contract rights as against Realty.

The Hawaii Supreme Court has reached the same conclusion on similar facts. In Newtown Meadows, the court was confronted with a plaintiff homeowner's association's claim that it was an intended third-party beneficiary of construction contracts between a general contractor, with whom the plaintiff had contracted with directly, and several of the general's subcontractors. See 115 Haw. at 269, 167 P.3d at 262. In considering this issue, the court surveyed and approved of cases from other jurisdictions which employ the following principle:

In general, although work performed by a subcontractor on a given parcel of property ultimately benefits the property owner, the property owner is not an intended third-party beneficiary of the contract between the general contractor and the subcontractor. Absent clear contractual language to the contrary, a property owner does not attain intended third-party beneficiary status merely because the parties to the subcontract knew, or even intended, that the construction would ultimately benefit the property owner.

Id. at 271, 167 P.3d 264 (emphasis in original) (quoting Kisiel v. Holz, 725 N.W.2d 67 (Mich. Ct. App. 2006)). Because the plaintiff homeowner's association "fail[ed] to indentify any language in the relevant subcontracts which constitute[d] a 'virtual express declaration to overcome the presumption that the parties contracted only for themselves'", the court in Newtown Meadows ruled that the plaintiff was not an intended third-party beneficiary. Id. at 272, 167 P.3d at 265.

The situation here is analogous. A homeowner contracts with a general contractor for the construction of a particular improvement. Plaintiffs have contracted with HPHA, through

their leases, for housing.

In turn, the general contractor enters into a contract with a subcontractor to perform some of its obligations under the contract with the homeowner. Similarly, HPHA has contracted with Realty to perform some of its obligations under the lease between HPHA and Plaintiffs.

In both cases, the homeowner/Plaintiffs certainly benefit from the services rendered pursuant to the subcontract/management contract. However, neither is considered an intended third-party beneficiary. Under Newtown Meadows, the lack of any evidence that Plaintiffs were intended to benefit from the management contract between HPHA and Realty compels the dismissal of the Third Cause of Action.

B. PLAINTIFFS' LEASE WITH HPHA DOES NOT QUALIFY AS A GOOD, A SERVICE, OR A PERSONAL INVESTMENT, AND THEREFORE HRS CHAPTER 480 IS INAPPLICABLE.

Plaintiffs contend that "Defendants"¹ have violated Hawaii Revised Statutes ("HRS") §480-2. Specifically, Plaintiffs claim that Defendants are liable under HRS 480-2 for allegedly failing to comply with State and County building, fire, safety, health, and sanitation regulations, as well as HUD requirements. The issue here is whether Plaintiffs have standing to sue, under our trade and commerce laws, for purportedly "unfair conditions" at KPT. The answer is no.

HRS 480-2 prohibits, in relevant part, "unfair or deceptive acts or practices in the conduct of any trade or commerce" HRS 480-2 (a). Only a "consumer" can sue on account of an allegedly unfair or deceptive act. See HRS 480-2 (d). The term "consumer" is defined as "a natural person who, primarily for personal, family, or household purposes, purchases, attempts to purchase, or is solicited to purchase *goods or services* or who commits money, property, or services in a *personal investment*." HRS §480-1 (emphasis added). The term "purchase" includes

¹ The Court previously dismissed this claim as against HPHA on the basis of sovereign immunity. See Exhibit "D", Order Granting in Part and Denying in Part Defendants' Motion to Dismiss Complaint for Failure to State Claims Upon Which Relief Can be Granted or, in the Alternative, for Summary Judgment, filed May 14, 2009.

a lease. See id.

Affording an overly generous reading of their cause of action, it appears that Plaintiffs are contending that in leasing their units at KPT, they are subjected to “unfair” living conditions. Therefore, the first question is whether Plaintiffs’ lease with HPHA for units at KPT qualifies as a purchase, attempt to purchase, or a solicitation to purchase “goods”.

This issue was resolved in the negative by the Hawaii Supreme Court in Cieri v. Leticia Query Realty, Inc., 80 Haw. 54, 905 P.2d 29 (Haw. 1995). Cieri involved a home buyer’s claim that the seller had failed to disclose plumbing problems with the subject home. See id. at 57, 905 P.2d at 32. Relying on Article 2 of the Uniform Commercial Code’s definition of “goods”, the court held that “real estate and residences are not ‘goods’ as that term is utilized in HRS §480-1.” Id. at 66, 905 P.2d at 41. Therefore, the plaintiff home buyers lacked standing to sue under HRS Chapter 480. See id.

The sole distinction here is that Plaintiffs lease, and did not buy, their units at KPT. As used in HRS Chapter 480, however, the term “purchase” explicitly includes not only outright sales, but leases as well. See HRS §480-1. Hence, Plaintiffs’ leases with HPHA do not qualify as purchases of goods under HRS §480-2.

Seeking to avoid Cieri, Plaintiffs’ counsel has previously taken the position (during the hearing on HPHA’s Motion to Dismiss) that Plaintiffs’ leases with HPHA somehow constitute purchases of services under HRS §480-2. There is no legal support for this novel theory. How can there be a lease for services? A lease is a transfer of a possessory right, not an arrangement for services. Black’s defines the term “lease” as “[a] contract for exclusive possession of lands, tenements or hereditaments for life, for term of years, at will, or for any interest less than that of lessor, usually for a specified rent or compensation.” Black’s Law Dictionary at 889 (6th ed. 1990) (citing Feeley v. Michigan Ave. Nat. Bank, 490 N.E.2d 15, 18). While there may be

ancillary services provided by HPHA (in part through Realty) in connection with the leases (primarily related to the common areas at KPT), the fundamental nature of the leases is to provide Plaintiffs with possession of units at KPT. This is not the purchase of a service.

The only other way for Plaintiffs to be considered “consumers” is if each lease constitutes “a personal investment”. In other words, does leasing a unit in a public housing complex constitute a “personal investment”, as that phrase is used in HRS §480-1? Cieri is instructive on this issue as well. The court there determined that “the *purchase* of real estate or a residence” qualifies as a “personal investment”. 80 Haw. at 67, 905 P.2d at 42 (emphasis added). Its reasoning was based on the observation that real estate is oftentimes purchased “with an intent to hold the property in anticipation of an appreciation in the parcel’s resale value.” Id.

Plaintiffs’ leases, however, cannot be considered personal investments. These are public housing leases. They are not transferable, they have no market value. When the lease is terminated, there is no financial benefit. Under no stretch of the word could Plaintiffs’ leases be considered an “investment”. Rather, they are a temporary solution to a need for shelter.

In sum, Plaintiffs’ leases do not qualify as the purchase of a good, service, or a personal investment. Consequently, Plaintiffs are not consumers as that phrase is used in HRS Chapter 480, and lack standing to pursue a 480-2 claim against Realty.

Alternatively, even if HRS Chapter 480 is applicable to the lease between Plaintiffs and HPHA, it cannot be applied to Realty. Plaintiffs are not “consumers” with respect to Realty. Plaintiffs have no direct contractual relationship with Realty, and therefore cannot be said to have purchased goods, services, or a personal investment from Realty. This lack of contractual privity is an independent ground for dismissal of Plaintiffs’ Chapter 480 claim against Realty.


C. REALTY IS ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFFS' MEDICAL MONITORING CLAIM BASED ON THE LAW OF THE CASE DOCTRINE.

The Court previously ruled that Plaintiffs' medical monitoring claim (Fifth Cause of Action) is a remedy but not a cause of action. See Exhibit "D", Order Granting in Part and Denying in Part Defendants' Motion to Dismiss Complaint for Failure to State Claims Upon Which Relief Can be Granted or, in the Alternative, for Summary Judgment, filed May 14, 2009 at 11. Consequently, the Court dismissed the Fifth Cause of Action as it relates to HPHA. Under the law of the case doctrine, Realty is entitled to dismissal of this claim as well. See Wong v. City & County of Honolulu, 66 Haw. 389, 396, 665 P.2d 157, 162 (Haw. 1983).

IV. CONCLUSION

Based on the foregoing, Realty respectfully requests that this Honorable Court grant the instant motion and enter summary judgment in Realty's favor as to all claims asserted against it in Plaintiffs' Complaint, filed herein on December 18, 2008.

DATED: Honolulu, Hawaii, June 18, 2009.



GEORGE W. PLAYDON, JR.
R. AARON CREPS
Attorneys for Defendant
REALTY LAUA LLC

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

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HOUSING AUTHORITY; REALTY)	
LAUA LLC, formerly known as R & L)	
Property Management LLC, a Hawai'i)	
limited liability company; and Does 1-20,)	
)	
Defendants.)	
)	

NOTICE OF HEARING MOTION

TO: VICTOR GEMINIANI, ESQ.
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STATE OF HAWAII and
HAWAII PUBLIC HOUSING AUTHORITY

NOTICE IS HEREBY GIVEN that *Defendant Realty Laua LLC's Motion for Summary Judgment* shall come on for hearing before the Honorable Sabrina S. McKenna, Judge of the above-entitled Court, in her courtroom at 777 Punchbowl Street, Honolulu, Hawaii, on July 27, 2009, at 9:00 o'clock a.m., or as soon thereafter as counsel can be heard.

DATED: Honolulu, Hawaii, June 18, 2009.



GEORGE W. PLAYDON, JR.
R. AARON CREPS
Attorneys for Defendant
REALTY LAUA LLC

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing document will be duly served upon the above-named parties on the date shown below by depositing same in the United States mail, postage prepaid.

DATED: Honolulu, Hawaii, June 18, 2009.



GEORGE W. PLAYDON, JR.
R. AARON CREPS
Attorneys for Defendant
REALTY LAUA LLC